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EDITOR'S NOTE

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No. 86-1128-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Assibi Abudu

Docketed:
January 6, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Harper,Dorothy A.

Entry	Date	Note	Proceedings and Orders
1	Jan 6 1987	G	Petition for writ of certiorari filed.
2	Feb 11 1987		DISTRIBUTED. February 27, 1987
3	Feb 13 1987		Brief of respondent Assibi Abudu in opposition filed.
4	Feb 20 1987	X	Reply brief of petitioner INS filed.
5	Feb 25 1987		REDISTRIBUTED. March 20, 1987
6	Mar 23 1987		Petition GRANTED.
			**********
9	May 1 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
8	May 4 1987		Order extending time to file brief of petitioner on the merits until June 6, 1987.
10	May 18 1987		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
12	Jun 5 1987		Record filed.
11	Jun 6 1987		Brief of petitioner INS filed.
14	Jul 3 1987		Order extending time to file brief of respondent on the merits until August 8, 1987.
15	Jul 22 1987		Record filed.
16	Aug 6 1987		Brief amicus curiae of American Immigration Lawyers Association filed.
17	Aug 7 1987		Brief amicus curiae of Lawyers Committee for Human Rights filed.
18	Aug 8 1987		Brief amicus curiae of Centro Presente, Inc filed.
19	Aug 8 1987		Brief of respondent Assibi Abudu filed.
20	Oct 9 1987		CIRCULATED.
21	Oct 9 1987		SET FOR ARGUMENT. Tuesday, December 1, 1987. (1st case).
22	Nov 20 1987	X	Reply brief of petitioner INS filed.
23	Dec 1 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 86-1128

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ASSIBI ABUDU

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether a decision by the Board of Immigration Appeals (BIA) denying an alien's motion to reopen deportation proceedings on the ground that the alien did not make a prima facie showing of entitlement to relief must be affirmed if it is plausible and not arbitrary.

2. Whether the BIA, in ruling on an alien's motion to reopen deportation proceedings, is required to draw all reasonable inferences in favor of the alien.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ASSIBI ABUDU

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-11a) is reported at 802 F.2d 1096. The opinion of the Board of Immigration Appeals (BIA) denying respondent's motion to reopen deportation proceedings (App., *infra,* 13a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 12a) was entered on October 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

8 U.S.C. 1158(a) provides:

> The Attorney General shall establish a procedure for an alien physically present in the United States or

at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. 1253(h) provides in pertinent part:

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 C.F.R. 3.2 provides in pertinent part:

Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * *

8 C.F.R. 3.8(a) provides in pertinent part:

Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. * * *

8 C.F.R. 208.11 provides in pertinent part:

[A motion to reopen to request asylum] must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. Nothing in this part, however, shall be construed to prevent an alien from requesting relief under section 243(h) during exclusion or deportation proceedings.

STATEMENT

1. Respondent, a licensed physician, is a native and citizen of Ghana. He entered the United States on a student visa in July 1973, with authority to remain here until February 1976. On April 7, 1981, he pleaded guilty in state court to various drug-related offenses.[1] Based on his criminal activity, the Immigration and Naturalization Service (INS) issued an order to show cause charging that respondent was deportable for violating the drug laws (see 8 U.S.C. 1251(a)(11)). The INS later supplemented the order to show cause to charge respondent with deportability for staying beyond the period authorized by his visa (see 8 U.S.C. 1251(a)(2)). App., *infra,* 2a, 14a, 22a.

On November 3, 1981, the INS commenced deportation proceedings against respondent. At a hearing on November 10, 1981, respondent indicated that he believed that his life would be threatened in Ghana and that,

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[1] The court (App., *infra,* 2a) and the BIA (*id.* at 14a) indicated that respondent pleaded guilty to one offense, but the record reveals that he entered guilty pleas to three separate charges: obtaining or attempting to obtain a controlled substance (Demerol) by fraud on two occasions (November 10, 1979, and November 14, 1979), and obtaining or attempting to obtain a controlled substance (Dilaudid) by fraud on December 26, 1979 (*id.* at 22a, 26a; 1 R. 65-66, 78-80) ("1 R." refers to the administrative record of the deportation proceeding; "2 R." refers to the administrative record of the motion to reopen). Because of his convictions, respondent appears ineligible for legalization under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), even though he entered this country before January 1, 1982. See Section 245A(a)(4)(B) and (d)(2)(B)(ii)(III) (added to 8 U.S.C. by Pub. L. No. 99-603, § 201(a)).

accordingly, he intended to apply for asylum (8 U.S.C. 1158(a)) and withholding of deportation (8 U.S.C. 1253(h)). The immigration judge (IJ) continued the proceedings to give respondent a chance to file such an application. App., *infra,* 2a, 15a-16a.

On January 11, 1982, respondent denied deportability based on the drug offenses but conceded deportability on the overstay of visa charge. He also sought adjustment of status under 8 U.S.C. 1255(a) based on his marriage to a United States citizen. App., *infra,* 2a, 14a.

On April 29, 1982, respondent's attorney advised the IJ that his client would not be seeking asylum or withholding of deportation but would be seeking only adjustment of status.[2] He maintained that position even after being advised by the IJ that an application for adjustment of status appeared to be meritless in light of his narcotics conviction. App., *infra,* 2a, 16a; 1 R. 55.

Respondent's deportation hearing was held on July 1, 1982. The IJ concluded that respondent was deportable under 8 U.S.C. 1251(a)(11) because of his criminal activity. He further concluded that respondent's criminal record constituted a non-waivable ground of excludability (see 8 U.S.C. 1182(a)(23)), thereby precluding adjustment of status (see 8 U.S.C. 1255(a)(2)). App., *infra,* 3a, 14a, 25a-28a. The BIA affirmed the IJ's decision (*id.* at 3a, 14a, 21a-24a).

2. Respondent subsequently appealed the BIA's ruling to the Ninth Circuit. On February 1, 1985, while that appeal was pending, respondent filed a motion with the BIA, pursuant to 8 C.F.R. 3.2, seeking to reopen his deportation proceedings in order to apply for asylum and withholding of deportation. Respondent claimed that his life and freedom would be threatened in Ghana by the regime of Flight Lt. Jerry Rawlings. According to the affidavits and other materials filed in support of the motion to reopen, respondent was closely associated with various enemies of the Ghanian regime. In particular, his brother's house in Ghana had previously been surrounded by government troops; his brother escaped and remains in exile. In addition, a lifelong friend of respondent's was declared by Rawlings to be the number one enemy of the government. App., *infra,* 3a-4a, 15a.

Respondent admitted that most of the evidence in support of his motion to reopen was available at the time of the deportation proceeding (App., *infra,* 16a). The only fact that post-dated that proceeding concerned a visit to respondent in the United States by an official of the Ghanian regime (*id.* at 16a-17a). Respondent indicated in his affidavit that he was contacted by the official " 'ostensibly for a friendly visit because [they] had known each other for many years' " (*id.* at 16a). Respondent claimed, however, that the conversation had "ominous overtones" (*id.* at 16a-17a). He noted that the official inquired about the whereabouts of respondent's brother and other enemies of the Ghanian regime. In addition, the visitor sought to convince respondent to return to Ghana. Respondent concluded that he was not being sought in Ghana for his skills as a physician but was wanted so that he could betray the whereabouts of his brother and other opponents of the Rawlings government. Respondent feared that because he did not return to Ghana as requested, he was " 'listed as a member of the conspiracy,' planning to stage a coup." *Id.* at 17a.

The BIA denied respondent's motion to reopen (App., *infra,* 13a-20a). It found that respondent had not adequately explained his failure to apply for asylum during his deportation hearing and therefore did not fulfill the

[2] In November 1981, when respondent expressed his intent to apply for asylum, Ghana's present ruler, Flight Lt. Jerry Rawlings, was temporarily out of power. By April 1982, when respondent abandoned his asylum claim, Rawlings had returned to power. See 2 R. 25-26, 33.

regulatory requirements for reopening (*id.* at 18a). The BIA noted (*id.* at 17a) that, in seeking reopening, respondent relied almost entirely upon facts that existed at the time of the deportation hearing.[3] Moreover, the one new fact presented—the visit from the Ghanian official—was, in the BIA's view, of questionable significance. As the BIA noted, the government official who visited him "was admittedly a long-time friend of the respondent's who in fact may have been paying a purely social visit" (*ibid.*). The BIA therefore was "not persuaded that the visit * * * was by itself so alarming that it explains the * * * failure to apply for asylum at the [deportation] hearing" (*ibid.*).

The BIA also emphasized the lack of specificity in respondent's purported grounds for fearing persecution. It noted (App., *infra*, 20a) that his "mere assertions of possible threats are lacking in specific, objective detail and do not constitute a prima facie showing of eligibility for either asylum or withholding of deportation." In addition, there was no adequate explanation concerning "how his relationships with [purported enemies of the Ghanian regime] would result in persecution to himself should he return to his native land" (*ibid.*). Moreover, his assertions that the present regime would consider him an "advance man" for a coup and would attempt to elicit information from him by force were, in the BIA's judgment, "speculative at best" (*ibid.*).

3. Respondent thereafter filed a petition for review in the Ninth Circuit. The Ninth Circuit reversed the BIA's denial of reopening and remanded the case for an evidentiary hearing (App., *infra*, 1a-11a).[4] The court first

[3] The BIA also noted the incongruous fact that Rawlings was not in power on the one instance during the deportation proceedings in which respondent expressed an interest in applying for asylum (App., *infra*, 16a n.1). See note 2, *supra*.

[4] The court affirmed the BIA's earlier holding that respondent was deportable because of his criminal record (App., *infra*, 4a-6a). That issue had been consolidated, for purposes of appeal, with the issue involving the BIA's denial of respondent's motion to reopen.

discussed the standards that it believed should be applied in reviewing the BIA's decision. The court indicated (*id.* at 6a) that the Supreme Court, in *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985), had stated that the BIA has "wide discretion" in ruling on motions to reopen. The court of appeals then added: "Here, however, the sole issue is whether [respondent] presented a *prima facie* case for reopening" (App., *infra*, 6a). Accordingly, reasoned the court, it was "not faced with the exercise of the Board's *administrative discretion*" (*ibid.* (emphasis in original)). Rather, the issue was whether the BIA's determination was "correct" and "in accordance with law" (*id.* at 7a). "[A]n agency," it stated, "will be held to have abused its discretion when it errs in determining what constitutes a prima facie case" (*ibid.*).

The court also summarized its view of the BIA's role in ruling on motions to reopen. According to the court, "for purposes of the limited screening function of motions to reopen," the BIA "must draw all reasonable inferences in favor of the alien unless the evidence presented is 'inherently unbelievable' " (App., *infra*, 9a-10a (citation omitted)). The court derived this principle by analogizing a motion to reopen to a motion for summary judgment (*ibid.*).

Applying the foregoing standards, the court overturned the BIA's denial of the motion to reopen. Respondent, it held, had presented "new evidence" of an "objective and specific" nature making out a prima facie case of a well-founded fear of persecution (App., *infra*, 11a). The visit from the Ghanian official "could reasonably have placed [respondent] in fear for his life" (*ibid.*). Furthermore, noted the court, respondent's "earlier aborted claims do not negate the relevance of this new development" (*ibid.*). The court acknowledged that the visit "could be viewed as benign," but stated that, because it "could also be viewed, as [respondent] suggests, as threatening," and because

respondent was entitled to have all inferences drawn in his favor, the new fact provided sufficient evidence to entitle respondent to reopening for a hearing on his asylum claim (*ibid.*).[5]

REASONS FOR GRANTING THE PETITION

The questions presented in this case are essentially the same as those presented in *INS* v. *Fazelihokmabad,* petition for cert. pending, No. 86-1008.[6] Both cases involve the extent to which a reviewing court is required to defer to the BIA's ruling on a motion to reopen deportation proceedings. And in both cases, the issue is whether the Ninth Circuit correctly applied the principles enunciated by this Court in *INS* v. *Rios-Pineda*; *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981); and *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984).

In our petition in *Fazelihokmabad,* we note that this Court has repeatedly underscored the BIA's broad discretion in ruling on motions to reopen deportation proceedings (86-1008 Pet. 11-12). A motion to reopen, we explain, is not provided for by statute but is purely a product of regulation (see 8 C.F.R. 3.2, 3.8(a)) to enable the BIA to reevaluate its prior disposition in cases where significant developments have occurred subsequent to the hearing and decision therein (86-1008 Pet. 10). We further point

[5] The court stated that "it is not clear" that respondent met the higher standard of proof necessary for withholding of deportation, but it ordered the BIA to consider both his withholding and his asylum claims on remand because "the relevant evidence will be identical on both claims" (App., *infra*, 11a). This Court now has before it the question whether the standard for asylum differs from that required for withholding of deportation. *INS* v. *Cardoza-Fonseca*, No. 85-782 (argued Oct. 7, 1986).

[6] We are providing respondent with a copy of our petition in *Fazelihokmabad.*

out that the regulation governing reopening is framed in the negative, and therefore does not affirmatively require the BIA to reopen the proceedings under any particular circumstance (*ibid.*). For those reasons, we argue, the role of the reviewing court is *not* to determine whether the BIA's decision is correct; rather, the BIA's denial of a motion to reopen must be affirmed if the decision is plausible or rational, does not depart from established policies, and does not rest on an impermissible basis such as invidious class-based discrimination (*id.* at 20).

In the present case, as in *Fazelihokmabad*, the Ninth Circuit improperly engaged in basically *de novo* review of the BIA's denial of a motion to reopen. The court in the present case explicitly held that when the BIA denies a motion to reopen on the ground that the alien has not established a prima facie case, the ruling must be reversed if, in the court's view, it is not "correct" (App., *infra*, 7a). That holding directly conflicts with this Court's decisions in *Rios-Pineda, Jong Ha Wang*, and *Phinpathya* concerning the BIA's broad discretion in ruling on a motion to reopen. Moreover, on the basis of a wholly inappropriate analogy to summary judgment (*id.* at 9a-10a), the court has further restricted the BIA's discretion by requiring the BIA to draw all inferences in the alien's favor.[7] The court

[7] The Ninth Circuit's reliance on summary judgment law is erroneous for two reasons. First, when the analogy is properly applied, the inevitable conclusion is that all inferences should be drawn *against* the alien, the moving party. As this Court has noted, "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party *opposing* the motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962) (emphasis added). Second, and in any event, a summary judgment motion is not meaningfully analogous to a motion to reopen. A motion for summary judgment seeks to terminate an ongoing judicial proceeding, whereas a motion to reopen seeks to reinstitute a completed proceeding. A motion to

in the present case ordered the immigration authorities to reopen deportation proceedings and to conduct an evidentiary hearing even though it acknowledged that the one new fact cited by respondent in support of his motion to reopen "could be viewed as benign" (*id.* at 11a). If the BIA is required to grant reopening even in those circumstances – and in those present in *Fazelihokmabad* – then it is difficult to envision many cases in which the denial of a motion to reopen would be proper.

Because of the similarity in issues involved, the Court's disposition of the petition in *Fazelihokmabad* is likely to control the disposition of the present case. Accordingly, it would be appropriate for the Court to hold this case pending its disposition of *Fazelihokmabad*.

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reopen is in fact more analogous to a motion for a new trial in a criminal case on the ground of newly discovered evidence. In a motion for a new trial, the moving party must come forward with new evidence that could not reasonably have been discovered earlier, and such evidence must be so compelling that it would probably produce an acquittal. See, *e.g.*, *United States* v. *Sutton*, 767 F.2d 726, 728 (10th Cir. 1985). An alien seeking to reopen his deportation proceeding must likewise come forward with material new evidence that could not have been discovered or presented at the original hearing. See 8 C.F.R. 3.2, 3.8, 208.11. Furthermore, both types of motions are not favored and should be granted only with great caution. *Sutton*, 767 F.2d at 728; *Jong Ha Wang*, 450 U.S. at 143-144 n.5. By analogy to a motion for a new trial, the BIA would not be required to draw inferences in the alien's favor, but rather would have authority to restrict reopening to cases in which the only inference – or at least the most compelling inference – to be drawn from the alien's new evidence is probable entitlement to the underlying relief being sought.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of the petition in *INS* v. *Fazelihokmabad*, No. 86-1008.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-7686; 86-7075
INS FILE No. A14593371

ASSIBI ABUDU, PETITIONER-APPELLANT,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE.

Argued and Submitted
August 4, 1986—Pasadena, California

Filed October 14, 1986

Before: J. Blaine Anderson, Harry Pregerson and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

Appeal from the Board of Immigration Appeals

OPINION

REINHARDT, Circuit Judge:

Petitioner, Dr. Assibi L. Abudu, a native and citizen of Ghana, petitions for review of two decisions of the Board of Immigration Appeals (BIA). First, the BIA held that because of a California conviction of an unlawful attempt to obtain a controlled substance (demerol) by fraud under Cal. Health & Safety Code § 11173(a), Dr. Abudu is deportable under Immigration and Nationality Act

§ 241(a)(11), 8 U.S.C. § 1251(a)(11) (an alien shall be deported who has been convicted of a violation of law relating to the illicit possession of a narcotic drug). We affirm the Board's holding that Dr. Abudu is deportable. Second, the BIA denied reopening and thus precluded Dr. Abudu from pursuing his prohibition against deportation and asylum claims. We reverse the BIA on this issue and remand for an evidentiary hearing.

FACTS

Dr. Assibi L. Abudu is a forty-one year old licensed physician, a native and citizen of Ghana, married to a United States citizen. He entered this country on a student visa on July 27, 1973, with authority to remain until February 6, 1976. On April 7, 1981, Dr. Abudu pleaded guilty in state court to unlawfully obtaining or attempting to obtain a controlled substance (demerol) by fraud. *See* Cal. Health and Safety Code § 11369. He was given a suspended sentence of one year's imprisonment and placed on probation for three years. On the basis of this conviction, the INS issued an order to show cause on August 7, 1981, charging that he was deportable under Immigration and Nationality Act § 241(a)(11), 8 U.S.C. § 1251(a)(11).

Deportation proceedings commenced November 3, 1981. At the November 10, 1981 proceeding Dr. Abudu expressed an intent to file an application for asylum and prohibition against deportation. On January 11, 1982, Dr. Abudu denied deportability on the narcotic conviction, but conceded deportability on an overstay of visa charge. Dr. Abudu requested adjustment of status based on his marriage to a United States citizen. On April 29, 1982, counsel stated he would not file for asylum and prohibition against deportation. The final deportation proceeding was conducted July 1, 1982.

On July 1, 1982, the immigration judge decided that Dr. Abudu's conviction, being on bifurcated charges, obtaining and attempting to obtain a controlled substance, must be construed as a conviction on the lesser attempt charge. The judge determined that obtaining a controlled substance is a deportable offense under Immigration and Nationality Act § 241(a)(11), and that an attempt to commit a deportable offense renders an alien equally deportable. Thus, he concluded, the conviction which rendered Dr. Abudu deportable under Immigration and Nationality Act § 241(a)(11) created a non-waivable ground of excludability under Immigration and Nationality Act § 212(a)(23), 8 U.S.C. 1182(a)(23), and precluded adjustment of status. On appeal, the Board affirmed the decision of the immigration judge. In addition the Board rejected Dr. Abudu's argument that the order to show cause was defective, finding that the order reasonably informed him of his alleged violation and the ground for his deportability with sufficient precision to allow him properly to defend himself.

On February 1, 1985, while the petition to review the original deportation order was pending before us, Dr. Abudu filed a motion to reopen to enable him to apply for asylum and prohibition against deportation. In the affidavits and materials that were filed in support of his motion, the following factsare alleged to be true: Dr. Abudu is closely associated with a least two exiled enemies of the present Ghana regime, a military dictatorship headed by Flight Lt. Jerry Rawlings. Rawlings initially came to power on June 4, 1979 and was subsequently arrested by the Limann government. On December 31, 1981, Rawlings regained power in a military coup. Dr. Abudu's brother is an economist who was connected with the now deposed Achaenpny government and also with the now deposed Limann government. In Ghana, Dr. Abudu's brother's house was surrounded by government troops, but he

escaped and now lives in hiding. Dr. Abudu's lifelong friend is Lt. Col. Joshua Hamidu, who was declared by Ghana's present dictator Rawlings to be the number one enemy of the government. In May and June of 1983 there were two coup attempts which involved dissidents from abroad. In 1984 Dr. Abudu was visited in the United States by a highly placed Rawlings government official, who attempted to acquire knowledge about the whereabouts of Rawlings' enemies and to persuade Dr. Abudu to return to Ghana.

The Board denied reopening on two grounds. First, it found that the considerations upon which Dr. Abudu relied in making his asylum and prohibition against deportation claims were in existence at the time he made the determination not to apply for such relief. Second, the Board concluded that Dr. Abudu's "mere assertions of possible threats are lacking in specific, objective detail and do not constitute a *prima facie* showing of eligibility for either asylum or prohibition against deportation."

DISCUSSION

I. DEPORTATION ORDER

The Board's determination of deportation must be sustained if it is supported by "reasonable, substantial and probative evidence." *Woodby v. INS*, 385 U.S. 276, 281 (1966). The interpretation of a statute is a question of law subject to *de novo* review. *Southeast Alaska Conservation Council, Inc. v. Watson*, 697 F.2d 1305, 1309 (9th Cir. 1983). A reviewing court will generally defer to an agency's interpretation if it is consistent with congressional intent and supported by substantial evidence. *Oregon Dept. of Human Resources v. Dept. of Health and Human Services*, 727 F.2d 1411, 1413 (9th Cir. 1983).

Dr. Abudu contends he was denied due process because the order to show cause was defective. He further contends his state conviction for attempting to obtain a controlled substance by fraud does not fall within the immigration statute at all because the conviction does not relate to illicit possession. He also claims the conviction is more akin to a use violation and that a use violation does not constitute a deportable offense.

A function of the order to show cause is to advise an alien of his alleged violation with sufficient precision to allow him to defend himself, *Matter of Chen and Hasan*, 15 INS 80. As the Board found, the order to show cause, which cites the correct provision of the statute, Immigration and Nationality Act § 241(a)(11), 8 U.S.C. § 1251, reasonably informed Dr. Abudu of his alleged violation and the ground for deportability. Despite the failure to include the precise phrase of the immigration statute which relates to illicit possession of a narcotic drug and the inclusion instead of a closely related but inapplicable clause, the citation to the appropriate section of the statute and the reference to the offense was sufficient to allow Dr. Abudu properly to defend himself.

Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251 renders deportability [*sic*] and § 212(a)(23) of that Act makes ineligible for adjustment of status, any alien who is convicted of a violation of "any law . . . relating to the illicit possession of . . . narcotic drugs." That provision requires that a conviction relate to illicit possession. A conviction for attempted illicit possession renders an alien as deportable as does a conviction for actual illicit possession. *See Bronsztejn v. INS*, 526 F.2d 1290, 1291 (2d Cir. 1975). We conclude also that unlawfully *obtaining* narcotics falls within the prohibition against unlawfully *possessing* such drugs. Thus, Dr. Abudu's conviction for violation of Section 11173(a) of the Cal. Health

and Safety Code, attempting to obtain demerol (a narcotic drug), falls within the immigration statute and constitutes a deportable offense.

II. ASYLUM AND PROHIBITION AGAINST DEPORTATION

A. Standard of Review

The Supreme Court recently reiterated that the Board has wide discretion to deny a petition by an alien seeking reopening. Such denials are reviewed for abuse of discretion. *See INS v. Rios-Pineda,* ____ U.S. ____, 105 S.Ct. 2098, 2101 (1985). Here, however, the sole issue is whether petitioner presented a *prima facie* case for reopening. "When the Board restricts its decision [refusing to reopen] to whether the alien has established a *prima facie* case it is only this basis for its decision that we review." *Hernandez-Oritz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). *See also Federal Power Commission v. Texaco Inc.*, 417 U.S. 380, 397 (1974) ("[A]n agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.' ") (citation omitted).

Our obligation as a reviewing court is to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2) & (A). Recently, an *en banc* panel of this court held that "the Board's refusal to grant reopening in the exercise of its administrative discretion [is to] be reviewed independently of the correctness of the Board's ruling on the question of statutory eligibility." *Gonzalez Batoon v. INS*, 791 F.2d 681, 684 (9th Cir. 1986). Here, we are not faced with the exercise of the Board's *administrative discretion*; rather, the issue on this appeal is whether the Board's decision to refuse to reopen on the ground that petitioner's application and supporting

material did not set forth a prima facie case for substantive relief must be reversed as not in accordance with the law.

The Board's denial of reopening will not be sustained (and thus the exercise of its discretion will not be held to be proper) if its ruling is not in accordance with the law. *See Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir., 1986) ("our review is limited to considering whether the BIA's 'determination concerning the prima facie case is *correct*.' ") (citation omitted) (emphasis in original). The BIA's action would be in accordance with law only if its conclusion that a prima facie case was not established is correct. *See Larimi v. INS*, 782 F.2d 1494, 1496 (9th Cir. 1986) ("The denial of a motion to reopen for failure to make out a prima facie case is always an appropriate exercise of discretion if the determination concerning the prima facie case is correct."); 5 U.S.C. § 706(2)(A). Thus, an agency will be held to have abused its discretion when it errs in determining what constitutes a prima facie case because "the court is accountable for the *correctness* of the interpretation it adopts." Levin, *Scope-of-Review Doctrine Restated*, 38 Ad. L. Rev. 239, 268 (1986) (comment to § (f), Restatement of Scope-of-Review Doctrine) (emphasis on original).

B. Prima Facie Case

Dr. Abudu seeks relief both under section 208(a) of the Refugee Act, 8 U.S.C. section 1158(a) (asylum), and section 243(h) of the Act, 8 U.S.C. § 1253(h) (prohibition against deportation). Dr. Abudu now appeals from a denial of his motion to reopen his deportation proceedings so that he may present these claims for relief.

A *prima facie* case is established when an alien presents "affidavits or other evidentiary material," 8 C.F.R. § 103.5 (1986), which, if true, would satisfy the requirements for substantive relief. *Reyes v. INS*, 673 F.2d

1087, 1089-90 (9th Cir. 1982). The requirements for substantive relief under section 208(a) (asylum) are less stringent than those under section 243(h) (prohibition against deportation.) *See Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1451 (9th Cir. 1985), *cert. granted*, 106 S.Ct. 1181 (1986). When a petitioner seeks substantive relief under section 243(h), he must demonstrate a clear probability that his life or freedom would be threatened if he returned to his country. *See INS v. Stevic*, 467 U.S. 407, 430 (1984). Persecution must be more likely than not. *Id.* at 429-30. Where the relief sought is asylum, however, the petitioner need only demonstrate that he is a refugee, i.e., that he has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Cardoza-Fonseca*, 767 F.2d at 1451; 8 U.S.C. § 1101(a)(42)(A) (1982).

The test for refugee status includes both a subjective and an objective component. *Bolanos-Hernandez*, 767 F.2d 1277, 1283 & n.11 (9th Cir. 1984). The subjective component is satisfied if the fear is genuine. The objective component is satisifed if persecution is, in fact, a reasonable possibility. *See id.* at 1282-83. In determining whether persecution is a reasonable possibility, the " 'conditions in the [alien's] country of origin, its laws and the experiences of others' " are relevant. *Bolanos-Hernandez*, 767 F.2d at 1283 n. 11 (citation omitted). The alien's desire " 'to avoid a situation entailing the risk of persecution' may be enough" to satisfy the well-founded fear test and thus establish eligibility for asylum. *Id.* (citation omitted).

In order to prevail on his motion to reopen, Dr. Abudu must establish a *prima facie* case for relief based on new material evidence. *Hernandez-Ortiz*, 777 F.2d at 513. Reopening procedures are provided by regulations promulgated by the Attorney General. *INS v. Rios-Pineda*, 105 S.Ct. 2098, 2100 (1985). The motion to reopen will not be granted unless "the evidence to be offered was not

available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2. *See Samimi v. INS*, 714 F.2d 992, 994 (9th Cir. 1983). Relief is sought "on the basis of circumstances which have arisen subsequent to the hearing." 8 C.F.R. § 3.2. If reopening is sought to apply for asylum, the motion must "reasonably explain" the failure to have sought asylum before the exclusion or deportation proceeding was administratively completed. Because motions to reopen are decided without hearing, the Board cannot make credibility determinations. *Hernandez-Ortiz*, 777 F.2d at 518. Accordingly, it must accept the factual statements in the alien's affidavit as true. *See Stevic*, 467 U.S. at 421 n.15.

Upon a motion to reopen, the Board must draw reasonable inferences from the facts in favor of the petitioner. A motion to reopen is analogous to a motion for summary judgment; each is accompanied by affidavits and other evidentiary material and may be granted if the motion presents "proof that will support the desired findings [of a prima facie case] . . . until it is contradicted or overruled by other evidence." *Maroufi v. INS*, 772 F.2d 597, 599 (9th Cir. 1985). In both cases, inferences are to be drawn in favor of the party whose entitlement to further proceedings is at stake: the non-moving party under Fed. R. Civ. P. 56 and the alien seeking reopening under 8 C.F.R. 3.2. *See, e.g., U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("choice of inferences to be drawn from the subsidiary facts contained in the affidavits . . . submitted [is inappropriate]. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."); *Water West, Inc. v. Entek Corp.*, 788 F.2d 627, 628-29 (9th Cir. 1986) (the court must "view the evidence and inferences . . . in the light most favorable to the non-moving party."). The party

seeking reopening must present " 'specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution.' " *Del Valle v. INS*, 776 F.2d 1407, 1411 (9th Cir. 1985) (citation omitted) (emphasis omitted). *See also Ghadessi*, 797 F.2d at 808 (petitioner "had produced evidence from which an inference can be drawn that Iranian government authorities might be aware of her anti-Khomeini activities."). A motion consisting "solely of conclusory and speculative inferences drawn from generalized events" may be insufficient to justify reopening, *Maroufi*, 772 F.2d at 599. However, for purposes of the limited screening function of motions to reopen, the BIA must draw all reasonable inferences in favor of the alien unless the evidence presented is "inherently unbelievable." *Hernandez-Ortiz*, 777 F.2d at 514.

According to his affidavit, Dr. Abudu received a visit in the United States from a highly placed Ghanian official who attempted to discover the whereabouts of his brother and to lure Dr. Abudu back to Ghana. The brother, who shares the doctor's exact name, held high positions under the now deposed Limann government and was placed under house arrest, but escaped from Ghana and is now in hiding. The fact that there have been threats against members of an alien's family is sufficient to support the conclusion that the alien's life or freedom is endangered. *Hernandez-Ortiz*, 777 F.2d at 515. Moreover, Dr. Abudu's life-long friend, Joshua Hamidu, has been declared Rawlings' number one enemy and is closely associated with two other exiled enemies from previous regimes.

Finally, in May and June of 1983, there were two attempted coups involving dissidents from abroad. Dr. Abudu alleges that he is thus a potential suspect in any possible coup plot by exiled Ghanian dissidents because of his close personal relationships with Rawlings' enemies.

The Board erroneously found that Dr. Abudu failed to present objective and specific evidence that he is at risk of persecution. Dr. Abudu has presented new evidence supporting his motion to reopen proceedings in order to file for asylum and prohibition against deportation. While the visit from the Ghanian official could be viewed as benign, it could also be viewed, as Dr. Abudu suggests, as threatening. Viewing the inferences in favor of the petitioner as we must, we conclude that the affidavits made out a prima facie case of well-founded fear of persecution. Although prohibition against deportation involves a higher standard, and it is not clear that Dr. Abudu meets that standard, since an evidentiary hearing will in any event be required on the asylum claim and the relevant evidence will be identical on both claims, the BIA is required to consider whether Dr. Abudu is entitled to either or both forms of relief. *See Ghadessi*, 797 F.2d at 805 n.1 ("As we hold that Ghadessi has established a prima facie case for asylum mandating reopening of proceedings, she should also be allowed to present evidence in support of a claim for prohibition of deportation."); 8 C.F.R. § 208.3(b).

The Board incorrectly found that all the considerations upon which Dr. Abudu relied in making his asylum and prohibition against deportation claims were in existence at the time he made the determination not to apply for such relief. Dr. Abudu has presented new evidence of material events that occurred subsequent to the deportation proceedings. The personal visit from the Ghanian official which occurred subsequent to the deportation proceedings could reasonably have placed Dr. Abudu in fear for his life. Dr. Abudu's earlier aborted claims do not negate the relevance of this new development. We reverse and remand for an evidentiary hearing on the asylum and prohibition against deportation claims.

Affirmed in part; reversed and remanded in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-7686; 86-7075
I&NS No. A14-593-371

ASSIBI ABUDU, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

[Filed Oct. 14, 1986]

JUDGMENT

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

File: A14 593 371- Los Angeles

In re: ASSIBI Z. *ABUDU*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:

Dorothy A. Harper, Esquire
Popkin, Shamir & Golan
3345 Wilshire Boulevard, Suite 318
Los Angeles, California 90010

ON BEHALF OF SERVICE:

Margaret M. Jambor
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)]– Convicted of narcotics violation

Lodged: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)]– Nonimmigrant–remained longer than permitted

APPLICATION: Reopening

11/7/85

This is the second time this case has been before us. On August 14, 1984, we dismissed an appeal taken by the respondent from an immigration judge's July 1, 1982, decision finding him deportable under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(11), and denying his application for adjustment of status. The respondent has now filed a motion to reopen to apply for asylum and withholding of deportation. The Immigration and Naturalization Service opposes reopening. The respondent's request for oral argument before the Board will be denied and the motion to reopen will be denied.

The respondent is a 41-year-old alien, a native and citizen of an African country. He first came to the United States in 1965, as a nonimmigrant student. He ultimately received a medical degree from the University of Southern California. His last admission to the United States was on July 27, 1973. On April 7, 1981, he was convicted in California of the offense of obtaining a controlled substance (demerol) by fraud. On August 7, 1981, an Order to Show Cause was issued against him, charging him with deportability under section 241(a)(11), as an alien who has been convicted of a violation of a law relating to narcotic drugs or marijuana. Subsequently, an overstay charge under section 241(a)(2) was also lodged against the respondent. Following a hearing, the respondent was found deportable on both grounds. His application for adjustment of status, based on his marriage to a United States citizen, was denied because of his narcotics conviction, which rendered him inadmissible to the United States and thus ineligible for adjustment. *See* sections 212(a)(23) and 245(c)(2) of the Act, 8 U.S.C. §§ 1182(a)(23) and 1255(c)(2). We affirmed these findings in our August 14, 1984, decision.

In the instant motion, the respondent claims that he would face persecution if forced to return to his native country. He claims that his brother and several "close associates" are enemies of the present regime there, that he is known to that regime, and that due to his associations, he would be considered an "advance man" for a coup attempt, and would be imprisoned or killed upon his return. In support of these contentions, the respondent has offered his own affidavit, the affidavit of an acquaintance who was granted refugee status in the United States, and numerous reports and commentaries on conditions in his homeland. The Service opposes reopening, arguing both that the respondent has failed to make a prima facie showing of eligibility for asylum and withholding and that he has not adequately explained his failure to apply for such relief at the deportation hearing.

A motion to reopen deportation proceedings for the purpose of applying for asylum or withholding of deportation will only be granted where prima facie eligibility for such relief has been established and where the alien has reasonably explained his failure to assert the claim prior to completion of the deportation hearing. 8 C.F.R. § 208.11. *See Dolores* v. *INS*, ____ F.2d ____, No. 84-3657 (6th Cir. Sept. 6, 1985); *Chavez* v. *INS*, 723 F.2d 1431 (9th Cir. 1984); *Martinez-Romero* v *INS*, 692 F.2d 595 (9th Cir. 1982), *aff'g. Matter of Martinez-Romero*, 18 I&N Dec. 75 (BIA 1981). Nor will reopening be granted unless the evidence sought to be offered is material, was not available, and could not have been discovered or presented at the time of the original hearing. 8 C.F.R. §§ 3.2, 103.5, 242.22; *see also Dolores* v. *INS, supra; Chavez* v. *INS, supra*.

The respondent in the present case originally indicated that he wished to apply for asylum and withholding of deportation. When his deportation hearing commenced on November 10, 1981, the respondent, in answer to a ques-

tion from the immigration judge, stated that he felt his life would be threatened in his native country due to his political opinions, and that he intended to file an application for asylum (Tr. at 4-5). The hearing was then continued to give the respondent an opportunity to make such an application. When the hearing reconvened on April 29, 1982, however, the respondent, through counsel, and again in response to a question from the immigration judge, stated that he would not be applying for asylum (Tr. at 11). Instead, he would apply only for adjustment of status. The immigration judge warned the respondent and his counsel that the respondent was probably ineligible for adjustment (Tr. at 12). Nevertheless, the hearing was again adjourned so that that application could be made. When the hearing resumed on July 1, 1982, the only application made, despite the immigration judge's warning as to its probable disposition, was for adjustment of status.

The respondent admits that most of the evidence offered in support of the instant motion was available at the time of his deportation hearing. The facts relating to the respondent's associations with alleged enemies of the present government in his country were the same at the time of the April 29, and July 1, 1982, hearings as they were at the time the motion was made.[1] The only fact which has come into existence since the time of the hearing is that the respondent was paid a visit here by a member of the government currently in power in his native country. The respondent states in his affidavit that he was contracted by this person "ostensibly for a friendly visit because we had known each other for many years." However, the respondent asserts that the conversation had ominous overtones. He was asked about his brother and other associates now in disfavor. His visitor tried to turn the conversation to politics. Finally, the respondent was asked when he would return home, and was offered assistance with any problems he might encounter in resettling. The respondent concluded that "this man wanted too badly for me to return." He claims that he was wanted not for his skills as a physician, but only so that he could be used to betray the whereabouts of his brother and others wanted by the government. Since he has not returned, he claims, he will be "listed as a member of the conspiracy," planning to stage a coup.

[1] Interestingly, the government which the respondent now claims to fear was not in power on November 10, 1981, the one occasion during his deportation proceeding on which the respondent expressed fear of persecution in his homeland.

We are satisfied from a careful review of the record that the respondent has not reasonably explained his failure to file his application at the hearing. 8 C.F.R. § 208.11; *Matter of Escobar,* 18 I&N Dec. 412 (BIA 1979). He was aware at the time of the hearing of the problems which his brother and other associates were allegedly facing, yet apparently those considerations did not then prompt him to seek asylum. Now, in seeking reopening, he relies heavily on those same considerations. Given that so much of the evidence upon which the respondent now bases his persecution claim was available at the time of the hearing, we are not persuaded that the visit by a member of the present government was by itself so alarming that it explains the respondent's failure to apply for asylum at the hearing. We note that the respondent's visitor was admittedly a long-time friend of the respondent's who in fact may have been paying a purely social visit.

The respondent complains on appeal that the immigration judge was obligated under the law "to elicit further facts on the respondent's claim that [he] feared for his life if returned" to his homeland. It was not enough, he claims, to simply ask whether or not an asylum application would be made. The respondent asserts that the immigra-

tion judge's failure to ask further questions once the respondent had expressed fear of returning justified his own failure to timely apply for asylum and withholding. These contentions are without merit. The immigration judge inquired at the April 29, 1982, hearing whether the respondent intended to pursue his asylum claim. The respondent, who was represented by counsel, responded that he did not. Even after being warned by the immigration judge that the application for adjustment of status would in all likelihood be denied, the respondent chose not to apply for ayslum in the alternative. The burden was on the respondent to go forward with his persecution claims, and the immigration judge had no duty to attempt to elicit such claims from him. The immigration judge did all he was obligated to do.

Inasmuch as the respondent had not adequately explained his failure to seek asylum and withholding at his deportation hearing, we find that his motion does not fulfill the regulatory requirements for reopening, and must therefore be denied. *See generally INS* v. *Wang,* 450 U.S. 139 (1981). We further find that the respondent has failed to make a prima facie showing of eligibility for asylum or withholding of deportation. His motion must accordingly be denied on that ground, as well.

To be eligible for withholding of deportation under section 243(h) of the Act, 8 U.S.C. § 1153(h), an alien must show a clear probability of persecution in the country designated for deportation, on account of race, religion, nationality, membership in a particular social group, or political opinion. *INS* v. *Stevic,* ____ U.S. ____, 104 S. Ct. 2489 (1984); *Sarvia-Quintanilla* v *INS,* 767 F.2d 1387 (9th Cir. 1985); *Bolanos-Hernandez* v. *INS,* 767 F.2d 1277 (9th Cir. 1985). This means that the facts as set forth by the alien must establish that it is more likely than not that he would be subject to persecution on one of the specified grounds. *INS* v *Stevic, supra,* at 2501. To be eligible for

asylum under section 208 of the Act, 8 U.S.C. § 1158, an alien must meet the definition of a "refugee," which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a)(42)(A) of the Act, 8 U.S.C. §1101(a)(42)(A); section 208 of the Act. The Ninth Circuit (in which this case arises) has held that to establish a "well-founded" fear of persecution, an alien "must point to specific, objective facts that support an inference of past persecution or risk of future persecution." *Cardoza-Fonseca* v *INS,* 767 F.2d 1448, 1453 (9th Cir. 1985). A motion to reopen to apply for withholding or asylum will not be granted unless a prima facie showing has been made that these standards have been met. *See generally Dolores* v. *INS, supra; Chavez* v. *INS, supra; Sanchez* v. *INS,* 707 F.2d 1523 (D.C. Cir. 1983); *Minwalla* v. *INS,* 706 F.2d 331 (8th Cir. 1983); *Matter of Martinez-Romero, supra; Matter of Bohmwald,* 14 I&N Dec. 408 (BIA 1973). The burden is on the alien to make such showings. *Minwalla* v. *INS, supra; Rejaio* v. *INS,* 691 F.2d 139 (3d Cir. 1982); *Matter of Martinez-Romero, supra.* The respondent herein has not met this burden.

In his affidavit, the respondent names several people who are in exile from the present government of his homeland, and to whom he claims close relationships. His brother is mentioned, both in the affidavit and in his I-589 asylum application. It is said that the brother was a government employee under a previous government, that at one point under the current regime, he had his house surrounded by troops, and was unable to leave his home for fear of being "accidentally killed," and that he is now living in exile. No affidavit from the brother has been offered, however, and no details have been provided as to the alleged troop actions around his house, or as to the circumstances of his escape and exile.

The respondent's affidavit, as well as the other affidavit, also mention the activities of several "associates" of the respondent who are "declared enemies" of the present government in his homeland. The respondent claims to be "like a brother" to one of these men. He does not provide details as to his relationships with the other men. In no case is it adequately explained how his relationships with these individuals would result in persecution to himself should he return to his native land. He claims that the government would attempt, by force, to elicit from him information about these people, and that because of his associations he would be considered an "advance man" for these individuals' attempts to stage a coup. We consider these conjectures to be speculative at best. His mere assertions of at best. [sic] His mere assertions of possible threats are lacking in specific, objective detail and do not constitute a prima facie showing of eligibility for either asylum and withholding of deportation.

Inasmuch as the respondent has neither reasonably explained his failure to apply for asylum and withholding of deportation at his hearing, nor demonstrated prima facie eligibility for such relief, his motion to reopen will be denied.[2]

ORDER: The motion to reopen is denied.

/s/ MARY MAGUIRE DUNNE
Acting Chairman

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[2] We note that a further possible ground of ineligibility for the relief sought exists. The respondent's conviction of a narcotics offense could possibly constitute a "particularly serious crime" rendering him ineligible for withholding of deportation and asylum. *See* section 243(h)(2)(B) of the Act; 8 C.F.R. § 208.8(f)(1)(iv); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). In view of our disposition of the case on other grounds, we find it unnecessary to decide whether the respondent's conviction was for a particularly serious crime.

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

File: A14 593 371- Los Angeles

In re: ASSIBI Z. *ABUDU*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:

Mikael Koltai, Esquire
10850 Wilshire Boulevard, Suite 1050
Los Angeles, California 90024

ON BEHALF OF SERVICE:

Rose Collantes
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. 1251(a)(11)]– Convicted of narcotics violation

Lodged: Sec. 241(a)(2), I&N Act [8 U.S.C. 1251(a)(2)]– Nonimmigrant–remained longer than permitted

APPLICATION: Termination; Adjustment of status

[August 14, 1984]

This matter is before the Board on appeal from the immigration judge's decision on July 1, 1982, finding the respondent deportable under both the original and lodged charges and denying his application for adjustment of status. The appeal will be dismissed.

The respondent is a 38-year-old native and citizen of Ghana who entered the United States on July 27, 1973, classified as a nonimmigrant student. The record reflects and the respondent concedes that he is deportable under the lodged charge as an "overstay" nonimmigrant. Therefore, the immigration judge properly concluded this charge of deportability is established by clear, convincing, and unequivocal evidence. The respondent does not challenge that finding herein.

The record also contains a certified record of conviction which shows that the respondent plead guilty and was convicted on May 26, 1981, of two counts of willfully obtaining or attempting to obtain the controlled substance Demerol, a Schedule II narcotic, by fraud under section 11173(a) of the Health and Safety Code of California, and another identical count regarding Dilaudid, also a Schedule II narcotic. He was sentenced to one year imprisonment which was suspended and he was placed on three years' probation and ordered to perform 100 hours community service. Based upon this narcotics conviction, the immigration judge properly concluded there is clear, convincing, and unequivocal evidence that the respondent is deportable under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11).

The respondent has argued both before the immigration judge and on appeal that his conviction does not render him deportable under section 241(a)(11) of the Act. We find these arguments to be without merit. Where an alien would be deportable if convicted of a particular substantive offense, he is also deportable for conviction of an attempt to commit that same offense. *Matter of Bronsztejn,*

15 I&N Dec. 281 (BIA 1974), *aff'd, Bronsztejn* v. *INS,* 526 F.2d 1290 (2d Cir. 1975). Conviction for the crime of obtaining Demerol by fraud clearly renders an alien deportable under section 241(a)(11). *Matter of McClendon,* 12 I&N Dec. 233 (BIA 1967). Consequently, the respondent is deportable as charged due to his conviction for attempting to obtain the controlled narcotic substance Demerol.

We also are unpersuaded by the respondent's claim that the Order to Show Cause is defective as it relates to this original charge of deportability. The Order to Show Cause properly charged the respondent with deportability under the correct subpart of the deportation statute, section 241(a)(11), citing the respondent's conviction relating to "obtaining controlled substances by fraud, to wit: Demerol . . . in violation of Section 11173(a) of the California Health and Safety Code." An Order to Show Cause is valid and not defective so long as it reasonably informs the alien of the alleged violation and ground of deportability with sufficient precision to allow him to properly defend himself. *Matter of Chery & Hasan,* 15 I&N Dec. 380 (BIA 1975). This the Order to Show Cause here clearly did as reflected by the conduct and arguments of the respondent, through counsel, both at the hearing and on appeal which demonstrate he fully understood and addressed himself to the various aspects of his alleged deportability under section 241(a)(11) based upon his California narcotics conviction and defended himself as best as possible under the circumstances. Accordingly, we reject the argument that the Order to Show Cause was defective.

The respondent further contends he is an appropriate candidate for the exercise of administrative discretion to terminate his deportation proceedings based on humanitarian considerations. However, the respondent addresses this request to the wrong authority. Only the District Director, not the Board or the immigration judge, has jurisdiction to direct that deportation proceedings be

terminated as improvidently begun, even after the entry of a deportation order. *Matter of Vizcarra-Delgadillo,* 13 I&N Dec. 51 (BIA 1968). Similarly, the issuance of an Order to Show Cause—which institutes deportation proceedings—is a matter solely within the prosecutorial discretion of the District Director and is not subject to review by the Board or the immigration judge. *See Matter of Quintero,* Interim Decison 2930 (BIA 1982); *Matter of Marin,* 16 I&N Dec. 581, 589 (BIA 1978). Once the Attorney General, acting through the Service, orders proceedings commenced against an alien, the immigration judge is compelled to order his deportation if the evidence supports a finding of deportability under the Act. *Guan Chow Tok* v. *INS,* 538 F.2d 36, 38 (2d Cir. 1976). *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 505 (BIA 1980). Therefore, we have no authority to terminate these proceedings on humanitarian grounds and the respondent must pursue any such request with the District Director.

As for the respondent's adjustment application, his narcotics conviction renders him inadmissible to the United States under section 212(a)(23) of the Act, 8 U.S.C. 1182(a)(23). Therefore, he is ineligible for adjustment of status and the immigration judge properly denied that application. *See* section 245(a)(2) of the Act.

ORDER: The appeal is dismissed.

/s/ DAVID L. MILHOLLAN
David L. Milhollan
Chairman

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No. A14 593 371 — July 1, 1982

In the Matter of)
)
ASSIBI Z. ABUDU,) IN DEPORTATION PROCEEDINGS
RESPONDENT)
)
)
)
)

CHARGE:

I&N Act, Section 241(a)(11)—Conviction of a violation of any law or regulation, governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein: the offense of obtaining controlling substances by fraud, to wit: Demerol, also known as Pethidine or Meperidine, in violation of Section 11173(a) of the California Health and Safety Code.

CHARGE: Lodged, Section 241(a)(2), I&N Act—Nonimmigrant remained longer.

APPLICATION: Termination and adjustment of status.

ON BEHALF OF RESPONDENTS:	ON BEHALF OF SERVICE:
Mikael Koltai, Esq. 10850 Wilshire Blvd. Ste. 1050 Los Angeles, CA	Jane Gersbacher, General Attorney Los Angeles, CA

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Ghana, who entered the United States at New York, New York, on or about July 27, 1973. At that time he was admitted as a non-immigrant student and authorized to remain until February 7, 1975. The foregoing allegations of fact were admitted and deportability was conceded on the lodged charge. Respondent denies that he is deportable on the charge contained in the Order to Show Cause.

On April 7, 1981, respondent entered a plea of guilty to a violation of 11173(a) of the Health and Safety Code, in violation of Counts 12, 13 and 14. Count 12 charges the respondent with willfully, unlawfully and feloniously obtaining or attempting to obtain a controlled substance, to wit, Demerol, also known as Pethidine or Meperidine, a Schedule II narcotic, by fraud, deceit and misrepresentation. Count 13 charges the respondent with the violation of attempting to obtain a controlled substance by fraud, in violation of Section 11173(a) of the Health and Safety Code. Count 14 is a similar charge, only in this case the respondent is charged with obtaining or attempting to obtain a controlled substance, Dilaudid, also known as Hydromorphone, a Schedule II narcotic, by fraud, deceit and misrepresentation. Counsel for the respondent argued that at the hearing the language in the deportation charge must be read narrowly and any question as to the conviction falling within the deportability section must be construed in favor of the respondent. Counsel further argues that there has been no evidence that the respondent "obtained" any controlled substance. The conviction by the wording of the charge is that he obtained or attempted to obtain. Of course, where there is a bifurcated charge, we must consider the lessor charge in arriving at a decision.

In the instant case I would have to consider that the respondent only attempted to obtain a controlled substance. Demerol is a narcotic which would make the respondent deportable under the provisions of Section 241(a)(11). See *Matter of McClendon*, 12 IN 233 (BIA, 1967). It should also be noted that the drug Pethidine is on the list of addiction-forming opiates. *Matter of McClendon*, supra, also has held that a misrepresentation of obtaining a controlled substance by fraud, deceit or misrepresentation or subterfuge, is a deportable defense.

Counsel for the respondent further urged that there has been no evidence that the respondent was trafficking in narcotics and the case is therefore distinguished from *The Matter of G–*6 IN 353 (BIA, 1954). The *Matter of G–*, however, stands for the proposition that a conviction of an attempt to commit a crime would bring an alien within the provisions of Section 241(a)(11). Now counsel for the respondent wants to distinguish this case from the *Matter of G–* in that there was no evidence that he intended to sell but merely a conviction for an attempt to obtain a narcotic. I am of the opinion, however, that this is a distinction without a significant difference. The Board, in the *Matter of Bronsztejn*, 15 IN 281 (BIA, 1974), again held that an alien is deportable if convicted of an attempt to commit an offense if the substance of the offense would render such an alien deportable. I do find therefore that the attempt to obtain a controlled substance does bring the respondent within the provisions of Section 241(a)(11).

I further find that deportability has been established by evidence which is clear, convincing and unequivocal on the charge contained in the Order to Show Cause.

Respondent submitted an application for adjustment of status. This application was submitted despite the fact that it did appear that the respondent would be excludable under the provisions of Section 212(a)(23) and inasmuch as I found that the respondent is deportable under the provisions of Section 241(a)(11), he would come within the excludable provisions of Section 212(a)(23). Despite the fact that the respondent is married to a citizen of the United States, there is no waiver for this ground of excludability. The application for adjustment of status will be denied.

Respondent has applied for no other discretionary relief nor is he eligible for any other discretionary relief. His deportation from the United States will be directed.

ORDER: IT IS ORDERED that the motion to terminate be denied.

IT IS FURTHER ORDERED that the application for adjustment of status be denied.

IT IS FURTHER ORDERED that respondent be deported from the United States to England on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforementioned country advises the Attorney General that it is unwilling to accept respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory respondent shall be deported to Ghana.

/s/ REECE B. ROBERTSON

Reece B. Robertson
Immigration Judge

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 181-483/40148

OPPOSITION

BRIEF

No. 86-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND
NATURALIZATION SERVICE,
Petitioner,

vs.

ASSIBI ABUDU,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a Motion to Reopen deportation proceedings for an asylum application, when the Board of Immigration Appeals ("BIA") has not decided whether discretion should be exercised in favor of the alien, whether once the alien shows a prima facie case of a well founded fear of persecution, the BIA is required to reopen the proceedings for an evidentiary hearing.

2. Whether reasonable inferences from the evidence presented on a Motion to Reopen to apply for asylum are to be viewed in the manner most favorable to a granting of an evidentiary hearing.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-1128

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ASSIBI ABUDU,

Respondent.

BRIEF IN
OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent ASSIBI ABUDU,

speaking through his counsel Dorothy A.

Harper, opposes the Petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of Court of Appeals (Pet.App. 1a-11a) is reported at 802 F.2d 1096. The opinion of the Board of Immigration Appeals ("BIA") (Pet.App. 13a-20a) is unreported.

JURISDICTION

The Court of Appeals judgment (Pet.App.12a) was entered on October 14, 1986. Respondent concurs that this Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL LAW, STATUTES AND REGULATIONS INVOLVED

Article 1, Section 8, U.S. Constitution provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> . . .
>
> Section 8
>
> The Congress shall have power . . . to establish a uniform rule of naturalization, . . .

U.S. Constitution, Amendment V, in pertinent part provides:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

8 U.S.C. 1101(a)(42)(A) provides in pertinent part:

> The term 'refugee' means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return

to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

8 U.S.C. 1158(a) provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. 1253(h) provides in pertinent part:

(1) The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be

threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. 1254a provides:

". . . the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien . . . who applies to the Attorney General for suspension of deportation and --

(1) is deportable ... has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application; and proves that during all of such period he was and is a person of good moral character; and is a person who deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent or child...

8 U.S.C. 1255(a) in pertinent part provides:

> The status of an alien . . . may be adjusted by the Attorney General, in his discretion . . .

8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted ... unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing....

8 C.F.R. 3.8(a) provides in pertinent part:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

8 C.F.R. 208.3(a)(2) as pertinent, provides:

> ... The asylum application shall be filed ... with the district director when the applicant:
>
> (2) Is in the United States regardless of status, and has not been served ... or with an Order to Show Cause.

8 C.F.R. 208.3(b) as pertinent, provides:

> ... Asylum requests made after the institution of exclusion or deportation proceedings shall be filed ... with the docket clerk of the immigration court. Such asylum requests shall also be considered as requests for withholding exclusion or deportation pursuant to 243(h) [8 U.S.C. 1253(h)] of the Act.

8 C.F.R. 208.11 provides in pertinent part:

> [A motion to reopen to request asylum] must reasonably explain the failure to request

asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. Nothing in this part, however, shall be construed to prevent an alien from requesting relief under section 243(h) during exclusion or deportation proceedings.

STATEMENT

A. Factual Summary.

Respondent agrees that the factual summary of this case was correctly stated by the Petitioner in its Petition (Pet. 3-8).

Additional facts contained in the record below are worthy of note.

The Respondent has actually resided in the United States since

September of 1965. His 1973 entry was to return from a summer visit to Ghana. (R.28) 1/

During that visit, sponsored by his brother and a lifelong friend, Respondent was recruited by the Ghanian government for a position with its medical division. That fact was recorded in the official records of the Ghanian government led by President Limman.

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1 But for his criminal conviction Respondent could adjust his status to a lawful permanent resident under 8 U.S.C. 1259, amended by the Immigration Reform and Control Act of 1986 to permit such adjustment if an alien has resided in the United States since January 1, 1972.

(R.28) 2/

B. The Nature of the Case.

The Ninth Circuit Court case that the government desires reviewed is a case where the Respondent presented to the BIA a prima facie case for reopening for an asylum application (Pet. App. 6a). The BIA denial was not made on discretionary grounds (Pet.App. 6a, 18a), rather, it was for failure to state a prima facie case. The Ninth Circuit panel reiterated the principle that it is always an abuse of discretion to determine a case not in accordance with the law. It then examined the Board's denial to determine whether it was in accordance with the law, noting that the Board's action would be in accordance with the law only if its determination concerning the prima facie case were correct.

The new evidence to support reopening was the fact of Respondent's 1984 visit from a Ghanian official. That evidence was ambiguous; it could have been viewed as either benign, or

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2 The Limman goverment was ousted by Flight Lt. Jerry Rawlings. Rawlings' coup had not yet been perfected when the Respondent first expressed fear for his life (Pet.Br.. N. 2,3). We believe this fact is an ambiguous one. It could be interpreted as either incongruous or as supporting the Respondent's affiliation with persons in the former Ghanian government that gave him more knowledge about the conditions in Ghana than one merely reading the daily news.

threatening. (Pet.App. 11a). The Court of Appeals ruled that this new evidence must be viewed in favor of Respondent for the purpose of reopening (Pet.App. 11a).

REASONS FOR DENYING THE PETITION

A. The Issue Of Whether The BIA Should be Required To Reopen The Case Should Not Be Reviewed.

The government urges review of this case for the same reasons as it urges the Court to review the Ninth Circuit Court of Appeals decision in the case of INS v. Fazelihokmabad, No. 86-1008, 794 F.2d 1470; it approaches the instant case as if it were a companion case to Fazelihokmabad (Pet.Br.8) and relies in large part upon the arguments

advanced and cases cited in its Fazelihokmabad brief. That reliance is misplaced because the issues are sharply distinct between the two cases.

The only similarity of issues is that both cases are Ninth Circuit Court of Appeals reviews of BIA denials of Motions to Reopen deportation proceedings. The government's argument is with the Ninth Circuit treatment of Motions to Reopen in view of this Court's affirmation of the BIA's wide discretion in granting or denying Motions to Reopen. INS v. Jong Ha Wang, 450 U.S. 139 (1981); INS v. Phinpathya, 464 U.S. 183 (1984); INS v. Rios-Pineda, 471 U.S. 444 (1985). The instant case was not, however, decided on purely discretionary

grounds. 3/

If we are to accept the government's posture that the instant petition and the Fazelihokmabad petition are to be viewed together, we must go far beyond the scope of this Court's prior

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3 No adjudicator has ever decided whether discretion should be exercised in Respondent's favor. The adjustment of status application was denied by the Immigration Judge for lack of statutory eligibility, (he was excludable because of his narcotics conviction). Noting that Respondent was not eligibile for any other form of discretionary relief (Pet. App. 28a), the Judge did not examine and weigh the favorable and adverse factors to be considered in the exercise of discretion. In its first review, the BIA rejected Respondent's request for exercise of administrative discretion to terminate proceedings for lack of jurisdiction (Pet. App. 23a, 24a).

decisions and assume that the BIA also has wide discretion to determine what constitutes a prima facie case of a well founded fear of persecution. That would be a bold proposition indeed. It is not based upon precedent and it may infringe upon the issues now pending before this Court in Cardoza v. Fonseca v.INS, 767 F.2d 1448 (9th Cir. 1985) cert. granted ___ U.S. _____ 106 S.Ct. 1131, 89 L.Ed.2d 298 (1986).

In Fazelihokmabad the motion was to Reopen to apply for adjustment of status and suspension of deportation (8 U.S.C. 1255(a) and 8 U.S.C. 1254(a)(1) respectively). Both of those requests are based upon statutes that specifically confer discretion upon the Attorney

General to grant extraordinary relief but leave substantial room for the Attorney General to define the substantive grounds for relief. Neither statute requires the Attorney General to make any findings of eligibility before he exercises his discretion to deny relief. INS v. Bagamasbad, 429 U.S. 24, 97 S.Ct. 200, 50 L.Ed.2d. 190 (1976); Leblanc v. INS, 715 F.2d 685 at 690 (1st Cir. 1983); 4/

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4 In Leblanc, the Court rejected an argument that holdings affirming wide discretion to deny a suspension case should not be applied to a motion to reopen to apply for adjustment of status. The difference was without a distinction because of the extraordinary nature of the relief in each. This principle is inapposite to a Motion to permit an asylum application for the reasons we advance in this brief.

Williams v. INS 773 F.2d 8 (1st Cir. 1985).

The Attorney General is near the height of his discretionary powers on immigration matters when he is presented with a request for suspension of deportation. Such relief is a matter of grace, described as gratuitous relief, and the Attorney General's discretion in dealing with such an application hs been described as unfettered. Jay v. Boyd, 351 U.S. 345 (1956).

That wide discretion in considering an application for suspension of deportation is not just discretion to grant or deny the relief. It includes the discretion to define one prong of the eligibility test, i.e., extreme hardship.

INS v. Jong Ha Wong, 450 U.S. 139.

In motions to reopen to apply for suspension of deportation, the discretion to grant or deny reopening [INS v. Rios-Pineda, 471 U.S. 444 (1984)] is stacked upon discretion to grant the underlying relief [INS v. Phinpathya, 464 U.S. 183 (1984)] which in turn is stacked upon the discretion to define the threshold eligibility [INS v. Jong Ha Wong, 450 U.S. 139]. This bundle of discretion puts the Attorney General at the height of his discretionary powers.

In the case at bar, the Attorney General has no discretion to define statutory eligibility for the relief sought. This Court has defined the level of proof required to qualify for

withholding of deportation under 8 U.S.C. 1253(h), Stevic v. Sava, 467 U.S. 407, 104 S.Ct. 2489 (1984), and affirmed that the BIA has no discretion to withhold deportation if certain facts exist. This Court now has pending before it the case of Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985) cert. granted __ U.S. __, 106 S.Ct. 1181, 89 L.Ed.2d 298 (1986) to determine the definition of the term "well founded fear of persecution".

When the BIA has made a decision on the merits of an asylum request under 8 U.S.C. 1158(a), its decision is reviewed under a two-tiered approach: first, the reviewing court reviews the BIA determination on the well founded fear of persecution question under the

substantial evidence standard; and second, the discretionary grant or denial is reviewed under the abuse of discretion standard. Estrada v. INS, 775 F.2d 1018, 1020 (9th Cir. 1985); Flores-De Solis v.INS, 796 F.2d 330 (9th Cir. 1986).

In this case the sole question before the Ninth Circuit was whether the Respondent had established a prima facie case of a well founded fear of persecution. The government now asks this Court to review the case to decide if the BIA is merely required to not be arbitrary or implausible when it defines a prima facie case. We urge that this is a mere artifice with words that attempts to shelter the BIA with discretion to define statutory eligibility to apply for

witholding and asylum.

The government's Petition for review is not supported by any cases that show a conflict among the circuit courts of appeal on the question of discretion to define a prima facie case for withholding [8 U.S.C. 1253(h)] or asylum [8 U.S.C. 1158(a)]. Instead, our opponent has swept this asylum case into the broad basket of discretionary powers granted to the Attorney General in suspension and adjustment of status cases. We urge that this broad "lumping together" would only lead to a confusion of the issues upon review, if such were to be granted, and it fails to support the granting of review.

A major reason advanced by the

government for granting certiorari is its contention that the Ninth Circuit has not correctly applied the principles enunciated by this Court in INS v. Rios Pineda, 471 U.S. 444 (1985); INS v. Jong Ha Wong, 450 U.S. 139 (1981) and INS v. Phinpathya, 464 U.S. 183. But, each of those cases deal with the Attorney General at the height of his discretion in suspension cases, while in the instant case, the Attorney General did not even purport to exercise his discretion. In short, the extent of the Attorney General's discretion to reopen deportation proceedings to permit the alien to apply for asylum does not need to be decided where, as here, the Attorney General did not exercise his

discretion.

B. The Ruling On The Interpretation Of Ambiguous Evidence Should Not Be Reviewed.

The government seeks review of the lower court's ruling that for the purposes of reopening deportation proceedings for asylum application the BIA must interpret ambiguous evidence in the light most favorable to the moving party (the would-be asylee). This request is not based upon a conflict among the circuits, nor upon conflict with prior holdings of this Court. Review appears to be urged because of dissatisfaction with that ruling.

We respectfully urge that this holding is a mere extension of the

guidelines of the United Nations High Commissioner for Refugees' Handbook On Procedures And Criteria For Determining Refugee Status (Geneva 1979), that because aliens have difficulties in collecting proof, credible accounts should be given the benefit of the doubt. 5/ See McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981). The factual statements in the alien's affidavit must be accepted as true, Stevic, 467 U.S. at 421, N. 15, and the BIA cannot make credibility determinations, Hernandez-

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5 The United States acceded to the Protocol in 1968. This Handbook is treated by the BIA as a significant source of guidance in determining asylum requests.

Ortiz v. INS, 777 F.2d 509, 517 (9th Cir. 1985). Hence, we urge that this holding does not depart so far from the accepted and usual course of judicial proceedings as to call for this Court's supervision. The Circuit Court's decision is consistent with our judicial system that prefers the right to an evidentiary hearing when there are issues of fact to be decided by the trier of fact. 6/

Certiorari should also be denied because all of the issues necessary to a

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6 The government takes exception to the Circuit Court's likening a motion to reopen to a motion for summary judgment, and urges other analogies. It appears to us that it is the result of the ruling that is important. The result is to view ambiguous evidence in a manner most favorable to the granting of an evidentiary hearing.

decision are not ripe for adjudication. The primary issue raised, briefed, argued and decided at the lower court was whether the Respondent presented a prima facie case of a well founded fear of persecution. The standard of review was mentioned, but the parties did not argue whether the BIA is required to reopen a case when a prima facie case of well founded fear of persecution has been shown and the BIA has not exercised its discretion. It is Respondent's position that the due process of law guarantees of the Fifth Amendment U.S. Constitution ensure the would-be asylee the right to be heard on his or her asylum claim.

Article I, Section 8 of the United States Constitution grants to

Congress exclusive power over immigration. Acting pursuant to that power, Congress enacted 8 U.S.C. 1158a. That statute requires the Attorney General to establish a procedure to apply for asylum. We urge that this has created a statutory entitlement to apply for asylum that is a property right protected by the due process of law guarantees of the Fifth Amendment, within the principles enunciated by this Court. Mathews v. Eldrige, 425 U.S. 319 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564; Perry v. Sindemann, 408 U.S. 593.

It might at first blush appear that the Attorney General's duty to

establish such procedures is discharged by 8 C.F.R. 208.3(a)(2) that allows an application to be submitted to the local INS district director and by 8 C.F.R. 208.3(b) that allows the application to be filed with the immigration court if deportation proceedings have been commenced. However, when, as here, the last of the events that gave rise to the well founded fear of persecution did not even happen until after the deportation proceedings have been concluded, is the alien to be denied his or her right to apply. We think not. We believe that the right to apply in such circumstances is supposed by the enactment of procedural limitations that the applicant must present new evidence that was not

available and could not have been discovered or presented at the hearing.

The right to apply for asylum, at least before the conclusion of deportation proceedings, but not necessarily the right to be granted asylum, has been recognized by several Courts. Jean v. Nelson, 711 F.2d 1455, 1507 (11th Cir. 1983), reversed on other grounds; Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038-39 (5th Cir. 1982); Orantes-Hernandez v. Smith, 541 F.Supp. 351, 375 (C.D. Cal. 1982); Nunez v. Boldin, 537 F.Supp. 578, 584 (S.D. Tex). Whether this right to apply for asylum is inceptive after the deportation proceedings are concluded so as to create a property right protected by Fifth

Amendment due process of law is a question that must be determined in order to decide the questions raised in review of the case.

These due process of law questions have not been sufficiently addressed prior to this stage of the proceedings to make them ripe for adjudication at this time.

CONCLUSION

Based upon the foregoing, we respectfully submit that certiorari should be denied.

Respectfully submitted,

By: Dorothy A. Harper
DOROTHY A. HARPER
Attorney for Respondent
ASSIBI ABUDU

REPLY BRIEF

No. 86-1128

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ASSIBI ABUDU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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OCTOBER TERM, 1986

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v.

ASSIBI ABUDU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

As we explained in our petition (at 8-10), the present case raises essentially the same issues as those presented in *INS* v. *Fazelihokmabad*, petition for cert. pending, No. 86-1008. Both cases involve the extent to which a reviewing court is required to defer to the ruling of the Board of Immigration Appeals (BIA) in the context of a motion to reopen deportation proceedings under 8 C.F.R. 3.2.

Respondent asserts (Br. in Opp. 12-30) that the Court should deny review and should not hold the case, as we requested, for appropriate disposition in light of its disposition of our petition in *Fazelihokmabad*. His principal point (Br. in Opp. 15-21) is that the present case involves a motion to reopen to apply for asylum (under 8 U.S.C. 1158(a)) and withholding of deportation (under 8 U.S.C. 1253(h)), whereas *Fazelihokmabad* involves a motion to reopen to seek adjustment of status (under 8 U.S.C. 1255(a)) and suspension of deportation (under 8 U.S.C. 1254(a)(1)).

That distinction, however, while factually correct, ignores the whole basis of the Immigration and Naturalization Service's concern.

As we pointed out (86-1128 Pet. 8-9; 86-1008 Pet. 11-14), the immigration statutes do not provide a vehicle for reopening deportation proceedings after a final deportation order has been entered. A motion to reopen is purely a product of regulation to enable the BIA to reevaluate its prior disposition in light of significant new developments. Relying on this Court's decision in *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981), we emphasized (86-1008 Pet. 11 & n.7) that the BIA must have the ability to be selective in ruling on motions to reopen in order to prevent unnecessary evidentiary hearings.[1]

These principles are fully applicable in the context of motions to reopen to apply for asylum and withholding of deportation. Respondent deliberately chose not to seek asylum or withholding of deportation during his actual deportation hearing (see 86-1128 Pet. 4). Therefore, his only vehicle for later seeking that relief was by filing a motion to reopen pursuant to the same regulation (8 C.F.R. 3.2) governing the motion filed by the respondent in *Fazelihokmabad*.[2] And that regulation in no way provides (or

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[1]That need for selectivity is exemplified by this case, since respondent concedes (Br. in Opp. 11) that the strength of his new evidence in support of his motion to reopen was "ambiguous."

[2]Respondent errs in asserting (Br. in Opp. 20) that "the sole question before the Ninth Circuit was whether [he] had established a prima facie case of a well founded fear of persecution." Rather, the important question for present purposes was whether the BIA correctly found that respondent had not offered significant new evidence and had not adequately explained his previous failure to seek asylum or withholding of deportation (see 8 C.F.R. 3.2, 208.11). The BIA plainly has broad discretion in deciding these questions, and therefore, contrary to the holding of the court of appeals (see 86-1128 Pet. App. 9a), is not required to draw all inferences in the alien's favor.

even implies) that reopening will be more liberally granted in cases involving asylum or withholding of deportation.

In *Jong Ha Wang*, this Court noted (450 U.S. at 144 n.5) that the regulation governing reopening "does not affirmatively require the Board to reopen the proceedings under any particular condition * * * [and thus] may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened." See also *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985) ("granting a motion to reopen is a discretionary matter with the BIA"). There is no basis for respondent's position that this Court's pronouncements involving 8 C.F.R. 3.2 can be ignored simply because the relief being sought in a motion to reopen is asylum or withholding of deportation.[3]

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of the petition in *INS* v. *Fazelihokmabad*, No. 86-1008.

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[3]Respondent's remaining claims also lack merit. Respondent asserts (Br. in Opp. 25-30) that review should be denied because he has a constitutional right to apply for asylum and withholding of deportation. This assertion is meritless. Even if there is such a right, which we in no way concede, respondent (as noted) had every opportunity to seek such relief during his deportation hearings but specifically declined to do so. Respondent cites nothing to suggest that there is *any* right, let alone a constitutional right, to obtain reopening of deportation proceedings. In any event, respondent never argued below that he was *constitutionally* entitled to reopening of his deportation proceedings.

Respondent also contends (Br. in Opp. 20) that the issue raised by the government was not raised below. That argument is erroneous. We specifically contended (Gov't C.A. Br. 15) that the standard of review articulated by this Court in *Jong Ha Wang* and *Rios-Pineda* is fully applicable in the context of motions to reopen to apply for asylum and withholding of deportation. And we emphasized (Gov't C.A. Br. 16) that a motion to reopen is purely a product of regulation and is not provided for by statute. Indeed, respondent himself conceded below (Abudu C.A. Br. 25) that the BIA has discretion in ruling on motions to reopen and cited *Rios-Pineda* as the governing authority.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

PETITIONER'S

BRIEF

No. 86-1128

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ASSIBI ABUDU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

CHARLES FRIED
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QUESTIONS PRESENTED

1. Whether a decision by the Board of Immigration Appeals (BIA) denying an alien's motion to reopen deportation proceedings on the ground that the alien did not make a prima facie showing of entitlement to relief must be affirmed if it is plausible and not arbitrary.

2. Whether the BIA, in ruling on an alien's motion to reopen deportation proceedings, is required to draw all reasonable inferences in favor of the alien.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 802 F.2d 1096. The opinions of the Board of Immigration Appeals (BIA) (Pet. App. 13a-20a, 21a-24a) are unreported. The decision of the immigration judge (Pet. App. 25a-28a) is likewise unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on October 14, 1986. The petition for a writ of certiorari was filed on January 6, 1987,

and was granted on March 23, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

8 U.S.C. 1158(a) provides:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. 1253(h) provides in pertinent part:

> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * *

8 C.F.R. 3.8(a) provides in pertinent part:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. * * *

8 C.F.R. 208.11 provides in pertinent part:

> [A motion to reopen to request asylum] must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. Nothing in this part, however, shall be construed to prevent an alien from requesting relief under section 243(h) during exclusion or deportation proceedings.

STATEMENT

1. Respondent, a licensed physician, is a native and citizen of Ghana. He first entered the United States in 1965 as a nonimmigrant student. In July 1973, he re-entered this country on a student visa, with authority to remain here until February 1976. In October 1980 he was charged in a California state court with 11 counts of obtaining narcotic drugs by "fictitious prescription." The prosecutor subsequently filed an amended information adding three additional counts of obtaining narcotic drugs "by fraud, deceit, misrepresentation, and subterfuge." On April 7, 1981, respondent pleaded guilty to the latter three charges. Based on his criminal convictions, the Immigration and Naturalization Service (INS) issued an order to show cause charging that respondent was deportable for violating the drug laws (see 8 U.S.C. 1251(a)(11)).[1] The INS later supplemented the

[1] Respondent appears to concede (Br. in Opp. 9 n.1) that because of his convictions, he is ineligible for legalization

order to show cause to charge respondent with deportability for staying beyond the period authorized by his visa (see 8 U.S.C. 1251(a)(2)). Pet. App. 2a, 14a, 22a; 1 R. 64-82.[2]

On November 3, 1981, the INS commenced deportation proceedings. Respondent indicated that he was not prepared to proceed and requested a continuance. The immigration judge (IJ) agreed to continue the matter for one week. On November 10, 1981, respondent stated that he wanted to plead to the allegations and requested that the hearing be reset for December. He admitted, through counsel, that he was not a citizen or national of the United States, that he was a native and citizen of Ghana, and that he entered the United States on or about July 27, 1973. He denied the narcotics convictions, as charged in the order to show cause, and he also denied deportability. Respondent designated England as the country where he wished to be sent if deported. The IJ designated Ghana as the country of deportation in the event that England declined to accept respondent. The IJ then asked respondent whether he thought that his life or freedom would be threatened in Ghana on account of his race, religion, nationality, membership in a particular social group or political opinion. Respondent replied that his life would be threatened because of his political opinion. The IJ then asked respondent's counsel whether respondent intended to apply for asylum (8 U.S.C. 1158(a)) and withholding of deportation (8 U.S.C. 1253(h)). His counsel replied affirmatively. The IJ then scheduled the hearing for January 11, 1982, and he instructed respondent to be prepared to present his asylum claim at that time. Pet. App. 2a, 15a-16a; 1 R. 41-42, 45-46, 82.

The hearing resumed on January 11, 1982. At that hearing the INS attorney supplemented the order to show cause with the additional charge of remaining in the United States beyond the period authorized by respondent's visa. Respondent asked for another continuance, which the IJ granted. The IJ also noted that respondent had previously indicated his intention to apply for asylum, and he specifically reminded respondent to bring his asylum application with him on the next hearing date. Pet. App. 2a, 14a; 1 R. 50, 64.

On April 29, 1982, when the hearing resumed, the IJ began by stating that the matter had been adjourned so that respondent could plead to the newly lodged charge and could apply for asylum or suspension of deportation. Respondent, through counsel, agreed with the IJ's recollection of the reasons for the adjournment. Respondent then admitted the overstay charge. The IJ asked respondent if he intended to apply for asylum, and respondent, again through his attorney, stated that he did not so intend and that he would be applying only for adjustment of status (based on his marriage to a United States

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under the Immigration Reform and Control Act of 1986 (Reform Act), Pub. L. No. 99-603, 100 Stat. 3359, even though he entered this country before January 1, 1982. See Section 245A(a)(4)(B) and (d)(2)(B)(ii)(III) (added to the Immigration and Nationality Act by Pub. L. No. 99-603, § 201(a), 100 Stat. 3394) (to be codified at 8 U.S.C. 1255A(a)(4)(B) and (d)(2)(B)(ii)(III)).

[2] "1 R." refers to the administrative record of the deportation proceeding; "2 R." refers to the administrative record of the motion to reopen. Ten copies of the entire administrative record have been lodged with this Court.

citizen).[3] The IJ advised respondent that the latter application appeared to be meritless, since the narcotics convictions rendered him statutorily ineligible for that relief (see 8 U.S.C. 1182(a)(23), 1255(a)). Respondent's attorney then requested additional time to research the issue of respondent's eligibility for adjustment of status. Pet. App. 2a, 16a; 1 R. 52-56.

The hearing resumed for the final time on July 1, 1982. Notwithstanding the IJ's warning at the prior proceeding, the only application submitted by respondent was for adjustment of status. The IJ concluded that respondent was deportable under 8 U.S.C. 1251(a)(11) because of his criminal activity. He further concluded that respondent's criminal record constituted a non-waivable ground of excludability (see 8 U.S.C. 1182(a)(23)), thereby precluding adjustment of status (see 8 U.S.C. 1255(a)(2)). Pet. App. 3a, 14a, 26a-28a; 1 R. 58. The BIA affirmed the IJ's decision (Pet. App. 21a-24a).

2. Respondent subsequently appealed the BIA's ruling to the Ninth Circuit. On February 1, 1985, while that appeal was pending, respondent filed a motion with the BIA, pursuant to 8 C.F.R. 3.2, 3.8(a), and 208.11, requesting that his deportation proceedings be reopened so that he could apply for asylum and withholding of deportation. Respondent claimed that his life and freedom would be threatened in Ghana by the regime of Flight Lt. Jerry Rawlings. According to the affidavits and other ma-

[3] In November 1981, when respondent expressed his intent to apply for asylum, Ghana's present ruler, Flight Lt. Jerry Rawlings, was temporarily out of power. By April 1982, when respondent abandoned his asylum claim, Rawlings had returned to power. See Pet. App. 16a n.1; 2 R. 25-26, 33.

terials filed in support of the motion to reopen, respondent was closely associated with various enemies of the Ghanian regime. In particular, his brother's house in Ghana had previously been surrounded by government troops; his brother escaped and remains in exile. In addition, a lifelong friend of respondent's, Lt. Col. Joshua Hamidu, was declared by Rawlings to be the number one enemy of the government. Pet. App. 3a-4a, 15a; 2 R. 16-17, 18, 20, 23, 25-39.

Respondent conceded that most of the evidence in support of his motion to reopen was available at the time of the deportation proceeding (Pet. App. 16a). The only event relating to respondent that occurred after the deportation hearing was a visit to him in the United States by an official of the Ghanian regime (*id.* at 11a, 16a-17a; Br. in Opp. 11; 2 R. 17). Respondent indicated in his affidavit that in the Spring of 1984, he received a telephone call from his brother Baba,[4] who told him that Abukari Alhassan, an official with the Rawlings government, had asked Baba how to contact respondent. In order "[t]o avoid suspicion," and because Baba knew that "as a physician [respondent] would be easy to find," Baba gave Alhassan respondent's phone number. Pet. App. 10a, 17a; 2 R. 29.

Alhassan had previously held an official position with a former government of Ghana, and he had allegedly spent a year in jail. After his release from jail, Alhassan purportedly "recanted his previous ties and joined the Rawlings' regime." At the time of the asylum application, Alhassan was the Ghanian

[4] Baba is not the same brother whose home in Ghana was surrounded by government troops.

Secretary of Housing and Construction. Pet. App. 10a, 17a; 2 R. 29.

According to respondent, the "ostensibl[e]" purpose of Alhassan's visit was a "friendly" one "because [they] had known each other many years" (2 R. 29-30). Respondent noted, however, that Alhassan inquired about respondent's brother and other enemies of the Ghanian regime. In addition, Alhassan sought to convince respondent to return to Ghana. Respondent concluded that he was not being sought in Ghana for his skills as a physician but was wanted so that he could betray the whereabouts of his brother and other opponents of the Rawlings government. Respondent purportedly feared that because he had not returned to Ghana as requested, he had been "listed * * * as a member of the conspiracy" planning to stage a coup. Pet. App. 17a; 2 R. 30-31.

3. The BIA denied respondent's motion to reopen on two separate grounds (Pet. App. 13a-20a). First, it ruled that respondent had not adequately explained his failure to apply for asylum and withholding of deportation during his deportation hearing and therefore did not fulfill the regulatory requirements for reopening (*id.* at 16a-18a (citing 8 C.F.R. 208.11)). The BIA noted (Pet. App. 17a) that, in seeking reopening, respondent relied almost entirely upon facts that existed at the time of the deportation hearing.[5] Moreover, the one new fact presented—the visit from the Ghanian official—was, in the BIA's view, of questionable significance. As

[5] The BIA also noted the incongruous fact that Rawlings was not in power on the one occasion during the deportation proceedings in which respondent expressed an interest in applying for asylum (Pet. App. 16a n.1). See note 3, *supra*.

the BIA noted, the government official who visited him "was admittedly a long-time friend of the respondent's who in fact may have been paying a purely social visit" (*ibid.*). The BIA therefore was "not persuaded that the visit * * * was by itself so alarming that it explain[ed] respondent's failure to apply for asylum at the [deportation] hearing" (*ibid.*).

Second, the BIA found that respondent failed to set forth a prima facie case of eligibility for either asylum or withholding of deportation (Pet. App. 18a-20a).[6] The BIA noted that respondent's purported grounds for fearing persecution were "lacking in specific, objective detail" (*id.* at 20a). It pointed out (*id.* at 19a) that while respondent alleged that his brother's house was surrounded by troops, "[n]o affidavit from the brother [was] offered * * * and no details [were] provided as to the alleged troop actions around [the brother's] house, or as to the circumstances of his escape and exile." With respect to the other "associates" referred to by respondent as "declared enemies" of the government, the BIA noted that with only one exception, respondent "[did] not provide details as to his relationships with" those men (*id.* at 20a). Moreover, the BIA observed, "[i]n no case [was] it adequately explained how his relationships with [purported enemies of the Ghanian regime] would result in per-

[6] Although this Court's decision in *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), had not yet been rendered, the BIA correctly recognized (Pet. App. 19a) that under Ninth Circuit precedent the "well-founded fear of persecution" standard applicable to asylum was a lower one than the "clear probability of persecution" standard applicable to withholding of deportation. See notes 12 & 13, *infra*.

secution to himself should he return to his native land" (*ibid.*). Finally, the BIA found that respondent's assertions that the present regime would consider him an "advance man" for a coup and would attempt to elicit information from him by force were "speculative at best" (*ibid.*).[7]

4. Respondent thereafter filed a petition for review in the Ninth Circuit. That court reversed the BIA's denial of reopening and remanded the case for an evidentiary hearing (Pet. App. 1a-11a).[8] The court first discussed the standards that it believed should be applied in reviewing the BIA's decision. The court indicated (*id.* at 6a) that the Supreme Court, in *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985), had stated that the BIA has "wide discretion" in ruling on motions to reopen. The court then added: "Here, however, the sole issue is whether [respondent] presented a *prima facie* case for reopening" (Pet. App. 6a).[9] Accordingly, the court reasoned, it

[7] The BIA also noted that the narcotics offense of which respondent was convicted might be a "particularly serious crime," making him ineligible for withholding of deportation and asylum. The BIA did not decide the issue, however, because of its disposition of the case on other grounds. Pet. App. 20a n.2.

[8] The court affirmed the BIA's earlier holding that respondent was deportable because of his criminal record (Pet. App. 4a-6a). That issue had been consolidated, for purposes of appeal, with the issue involving the BIA's denial of respondent's motion to reopen.

[9] The court's statement of the issue overlooked the fact that the BIA had denied reopening on a second (and independent) basis, namely, respondent's failure to meet the regulatory requirements for reopening. The government had urged this alternative basis as a separate ground for affirming the BIA's decision (Gov't C.A. Br. 16-20).

was "not faced with the exercise of the Board's *administrative discretion*" (*ibid.* (emphasis in original)). Rather, the issue, in the court's view, was whether the BIA's determination was "correct" and "in accordance with law" (*id.* at 7a). "[A]n agency," it stated, "will be held to have abused its discretion when it errs in determining what constitutes a prima facie case" (*ibid.*).

The court also summarized its view of the BIA's role in ruling on motions to reopen. According to the court, "for purposes of the limited screening function of motions to reopen, the BIA must draw all reasonable inferences in favor of the alien unless the evidence presented is 'inherently unbelievable'" (Pet. App. 10a (citation omitted)). The court derived this principle by analogizing a motion to reopen to a motion for summary judgment (*id.* at 9a).

Applying the foregoing standards, the court reversed the BIA's denial of the motion to reopen. Respondent, it held, had presented "new evidence" of an "objective and specific" nature making out a prima facie case of a well-founded fear of persecution (Pet. App. 11a). The visit from the Ghanian official "could reasonably have placed [respondent] in fear for his life" (*ibid.*).[10] Furthermore, the court noted, respondent's "earlier aborted claims [did] not

[10] According to the court (Pet. App. 11a), the BIA "incorrectly found that all the considerations upon which [respondent] relied in making his asylum and prohibition against deportation claims were in existence at the time he made the determination not to apply for such relief." The court then cited the visit from the Ghanian official as the new fact that the BIA had purportedly ignored (*ibid.*). In fact, however, the BIA acknowledged that the visit from the official postdated the deportation hearing (*id.* at 16a).

negate the relevance of this new development" (*ibid.*). The court acknowledged that the visit from the Ghanian official "could be viewed as benign," but it stated that, because the visit "could also be viewed, as [respondent] suggests, as threatening," and because respondent was entitled to have all inferences drawn in his favor, the new fact provided sufficient evidence to entitle respondent to reopening for a hearing on his asylum claim (*ibid.*).[11]

SUMMARY OF ARGUMENT

I.A. The Immigration and Nationality Act, 8 U.S.C. (& Supp. III) 1101 *et seq.*, does not provide a vehicle for reopening deportation proceedings after a final order of deportation has been entered. The Attorney General has nevertheless established such a procedure by regulation (8 C.F.R. 3.2). The purpose of the regulation is to prevent hardship in cases where there have been significant developments subsequent to the deportation hearing. The regulation does not specify that reopening will be granted in any particular circumstance; instead, it leaves that determination to the BIA. Since the reopening procedure is provided solely as a matter of administrative grace, common sense would dictate that the BIA should have broad discretion in deciding when to reopen a case. Granting such motions too liberally would overload the immigration authorities with evidentiary hearings in cases which have already been fully adjudicated and would provide

[11] The court stated that "it is not clear" that respondent met the higher standard of proof necessary for withholding of deportation, but it ordered the BIA to consider both his withholding and his asylum claims on remand because "the relevant evidence will be identical on both claims" (Pet. App. 11a).

incentives to aliens to file frivolous motions solely to delay deportation.

Recognizing these principles, this Court has repeatedly held that the BIA has broad discretion in ruling on motions to reopen. See *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); and *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981). Correspondingly, it has made clear that a reviewing court must apply a deferential standard of review. Thus, in *Rios-Pineda*, the Court ruled that the BIA's denial of reopening was proper because its decision was not an "unreasoned or arbitrary exercise of discretion" (471 U.S. at 451). This, we submit, is the proper standard of review. Even if the reviewing court would have granted reopening, it must affirm the BIA's contrary decision as long as the BIA's ruling is reasoned and not arbitrary.

B. In the present case, the court of appeals fashioned two broad rules to govern motions to reopen. First, it held that in ruling on a motion to reopen, the BIA must draw all reasonable inferences in favor of the alien (Pet. App. 9a). Second, it held that the BIA's refusal to reopen because of the alien's failure to set out a prima facie case must be reversed if that decision is not "correct" (*id.* at 7a). These rules of review, and their application in this case, impermissibly undermine the BIA's discretion.

The court of appeals' first rule forces the BIA to give dispositive significance to ambiguous facts. It therefore compels the BIA to reopen even in marginal or insubstantial cases. In addition to conflicting with this Court's decisions in *Rios-Pineda*, *Phinpathya*, and *Jong Ha Wang* dealing with motions to reopen, that rule is contrary to the more general

principle of administrative law that it is for the agency, not the court, to decide which of several reasonable inferences should be drawn from the facts. See, *e.g.*, *FTC* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52, 63 (1927).

Similarly, the court's second rule improperly undermines the BIA's discretion by enabling the court to substitute its judgment for that of the agency. The proper standard is not whether the BIA's decision is "correct," but, as we have noted, only whether it is reasoned and not arbitrary.

C. The present case involves a motion to reopen to apply for asylum and withholding of deportation. Although the court of appeals did not limit its two rules to any specific type of motion to reopen, it is nonetheless true that *Jong Ha Wang*, *Phinpathya*, and *Rios-Pineda* all involved motions to reopen to apply for suspension of deportation. This distinction, however, does not undermine the applicability of those decisions. Regardless of the relief being sought, the alien requesting reopening must submit his application under the same regulation (8 C.F.R. 3.2). Moreover, in all cases, the BIA has a strong interest in ensuring that reopening is granted (and evidentiary hearings ordered) only where the alien's claim has obvious merit. Of equal importance, the Attorney General and his delegates are entitled to deference because of their expertise in evaluating the legitimacy of an alien's claim that his life or freedom would be threatened in his native country. Indeed, even when the alien applies for withholding of deportation or asylum *during* the deportation hearing, the BIA's denial of such relief is reviewed under a deferential standard in which the court does not substitute its judgment for that of the BIA. See, *e.g.*, *Cruz-Lopez* v. *INS*, 802 F.2d 1518, 1519 n.1

(4th Cir. 1986); *Diaz-Escobar* v. *INS*, 782 F.2d 1488, 1493 (9th Cir. 1986). It follows, *a fortiori*, that when the alien is asking the agency to *reopen* his proceeding, the agency must be given even greater deference.

It is therefore not surprising that the courts have repeatedly held that the principles enunciated in this Court's decisions are applicable to motions to reopen involving requests for asylum or withholding of deportation. See, *e.g.*, *Ganjour* v. *INS*, 796 F.2d 832, 837-838 (5th Cir. 1986); *Yousif* v. *INS*, 794 F.2d 236, 241 (6th Cir. 1986); *Haftlang* v. *INS*, 790 F.2d 140, 143 (D.C. Cir. 1986); *Maroufi* v. *INS*, 772 F.2d 597, 598-601 (9th Cir. 1985). Cf. *Ananeh-Firempong* v. *INS*, 766 F.2d 621, 625, 626 (1st Cir. 1985) (distinguishing mandatory nature of withholding of deportation from discretionary remedies, but relying on *Rios-Pineda* for proposition that BIA's denial of motion to reopen to apply for withholding must be affirmed if it is "reasonable"). Indeed, respondent himself conceded below that *Rios-Pineda* was the governing authority and that the proper standard was abuse of discretion (Abudu C.A. Br. 25).

Even in the criminal context, reopening because of new evidence is deemed an extraordinary remedy. A motion for a new trial in a criminal case on the basis of newly discovered evidence is disfavored and will not be granted unless the new evidence could not have been discovered before trial and is so compelling that it probably would result in an acquittal. See, *e.g.*, *United States* v. *Sutton*, 767 F.2d 726, 728 (10th Cir. 1985); *United States* v. *Vergara*, 714 F.2d 21, 22 (5th Cir. 1983). The justification for finality is, if anything, greater in the deportation context than in the criminal context.

II. The BIA properly denied reopening in this case. The one new fact relating to respondent that post-dated the deportation hearing, *i.e.*, the visit from the Ghanian official, could reasonably be viewed as benign, as both the court of appeals (Pet. App. 11a) and respondent (Br. in Opp. 11) acknowledged. Since all of the other facts existed at the time of the deportation hearing, the BIA correctly held that respondent did not adequately explain his failure to seek asylum or withholding of deportation during the deportation hearing, as required by 8 C.F.R. 208.11.

The BIA also acted within its discretion in ruling that respondent failed to establish a prima facie case for asylum or withholding of deportation. Respondent offered no evidence showing a threat of persecution directed against *him*. He simply alleged that various "associates" were in danger, and he speculated, with no evidentiary support, that he might therefore be viewed as a co-conspirator in plans for a coup attempt. Moreover, apart from the visit from the Ghanian official, all of the relevant facts existed at the time of the deportation hearing, yet respondent was not sufficiently concerned at that time to apply for asylum or withholding of deportation. Accordingly, the BIA's decision that respondent failed to establish a prima facie showing of eligibility for asylum or withholding of deportation was not unreasoned or arbitrary and should have been upheld by the court below.

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS PROPERLY DENIED RESPONDENT'S MOTION TO REOPEN DEPORTATION PROCEEDINGS

This Court has repeatedly underscored the broad discretion of the Attorney General and his delegates in deciding when to reopen deportation proceedings. See *INS* v. *Rios-Pineda*, 471 U.S. 444, 449-451 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143-144 n.5 (1981). Notwithstanding this Court's pronouncements, the court of appeals has improperly restricted the BIA's discretion in ruling on motions to reopen by (1) requiring the BIA, in ruling on such motions, to draw all inferences in favor of the alien, and (2) reviewing de novo the BIA's determination that an alien has failed to establish a prima facie case for relief. According to the court of appeals, the BIA's role in ruling on a motion to reopen is merely a "*limited* screening function" (Pet. App. 10a (emphasis added)). The court's erroneous analysis would enable aliens to reopen their deportation proceedings and to obtain new evidentiary hearings even in insubstantial cases.

This case dramatically illustrates the point. Respondent has been in this country illegally since 1976. His deportation hearing occurred in 1982. Yet the Ninth Circuit has now ordered the immigration authorities to conduct a new round of evidentiary hearings, based solely on so-called "newly discovered evidence" that even the court of appeals and respondent admitted could be viewed as benign or ambiguous. Such a result cannot be reconciled with the teachings of this Court.

A. Because Of The BIA's Broad Discretion In Deciding Whether To Grant Reopening, Its Decision Must Be Affirmed If It Is Reasoned And Not Arbitrary

1. When an alien applies for asylum or withholding of deportation *during* his deportation hearing, a court reviewing the BIA's decision is required to apply a deferential standard of review. Specifically, with respect to withholding of deportation,[12] the courts have held that the issue is not whether the BIA was "correct," but only whether there was substantial evidence to support its decision. See, *e.g.*, *Lazo-Majano* v. *INS*, 813 F.2d 1432, 1434 (9th Cir. 1987); *Cruz-Lopez* v. *INS*, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986) (citing cases); *Diaz-Escobar* v. *INS*, 782 F.2d 1488, 1493 (9th Cir. 1986) (citations omitted) ("Under the deferential substantial evidence standard, we may not reverse the BIA simply because we disagree with its evaluation of the facts, but only if we conclude that the BIA's evaluation is not supported by substantial evidence."); cf. *Marroquin-Manriquez* v. *INS*, 699 F.2d 129, 133 & n.5 (3d Cir. 1983) (standard of review of denial of withholding of deportation is abuse of discretion), cert. denied, 467 U.S. 1259 (1984). Similarly, with

[12] An alien seeking withholding of deportation must show that his "life or freedom would be threatened * * * on account of race, religion, nationality, membership in a particular social group, or political opinion" (8 U.S.C. 1253(h)(1)). Withholding of deportation ordinarily must be granted by the Attorney General if the alien establishes a "clear probability of persecution." See *ibid.*; *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 7-8; *INS* v. *Stevic*, 467 U.S. 407, 426 (1984). But see 8 U.S.C. 1253(h)(2) (setting out various categories of aliens who are ineligible for withholding of deportation).

respect to asylum,[13] the questions are (1) whether there was substantial evidence to support the BIA's finding of no well-founded fear of persecution and (2) whether the ultimate denial of asylum constituted an abuse of discretion. See, *e.g.*, *Mendez-Efrain* v. *INS*, 813 F.2d 279, 282-283 (9th Cir. 1987); *Cruz-Lopez* v. *INS*, 802 F.2d at 1519 n.1 (citing cases).

Even if an alien did not apply for withholding of deportation or asylum during the deportation hearing, he can still attempt to convince the immigration authorities to reopen his deportation hearing to entertain such a request. The Immigration and Nationality Act (the Act), 8 U.S.C. (& Supp. III) 1101 *et seq.*, does not itself provide for reopening of deportation proceedings after a final order of deportation has been entered. And Congress has not seen fit to codify such a procedure in subsequent immigration legislation.[14] That procedural device is purely

[13] An alien seeking asylum must show that he is a "refugee" within the meaning of Section 208(a) of the Refugee Act of 1980 (Refugee Act), 8 U.S.C. 1158(a), which is defined in 8 U.S.C. 1101(a)(42)(A) to mean a person who cannot or will not return to his country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *." To be eligible for asylum, the alien must establish at least a "well-founded fear of persecution," a standard that is lower than the "clear probability of persecution" standard. See *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987). Even if the alien establishes a well-founded fear, the Attorney General has discretion to deny asylum relief (slip op. 23, 28).

[14] For example, in enacting the Reform Act in 1986, Congress overruled the Court's holding in *Phinpathya* that any absence, however brief, breaks the continuity of physical

a product of regulation (see 8 C.F.R. 3.2, 3.8(a), 208.11)[15] to enable the BIA to re-evaluate its prior disposition in cases where significant developments have occurred subsequent to the hearings and decisions therein. See *Rios-Pineda*, 471 U.S. at 446; *Jong Ha Wang*, 450 U.S. at 140-141. Furthermore, the regulation is stated in the negative: "Motions to reopen * * * shall *not* be granted *unless* it appears *to the Board* that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing" (8 C.F.R. 3.2 (emphasis added)). See also 8 C.F.R. 208.11 (motion to reopen "must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding"). As this Court has recognized, the regulation "does not affirmatively require the Board to reopen the proceedings under any particular condition." *Jong Ha Wang*, 450 U.S. at 143-144 n.5.

Since the vehicle for reopening is purely a product of regulation, and since that regulation does not mandate reopening under any specified circumstance, it stands to reason that the BIA's denial of a motion to reopen to apply for asylum or withholding of de-

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presence for purposes of eligibility for suspension of deportation. See *INS* v. *Hector*, No. 86-21 (Nov. 17, 1986), slip op. 6 n.7. Congress expressed no dissatisfaction, however, with this Court's decisions (or with those of the various circuits) underscoring the broad discretion of the BIA in ruling on motions to reopen. Similarly, the Refugee Act contains no provision entitling aliens to reopen deportation proceedings in order to apply for asylum or withholding of deportation.

[15] See also 8 C.F.R. 103.5 (motions to reopen before the District Director); 8 C.F.R. 242.22 (motions to reopen before an immigration judge).

portation must be given even greater deference than its denial of a request for such relief that is made *during* the deportation hearing. See *Kaveh-Haghigy* v. *INS*, 783 F.2d 1321, 1322 (9th Cir. 1986) (noting that where alien seeks asylum or withholding of deportation by way of a motion to reopen, "the government's actions are reviewed under a more lenient abuse of discretion standard"); cf. *Sang Seup Shin* v. *INS*, 750 F.2d 122, 131 (D.C. Cir. 1984) (Starr, J., dissenting) ("The Board's discretion * * * is at its zenith in making a discretionary procedural determination which Congress did not see fit to enact."). See generally *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980) (citing *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945)) (agency's construction of its own regulations is entitled to great deference).

It is our submission that the BIA's ruling on a motion to reopen must be affirmed if it is reasoned and not arbitrary. Cf. *Rios-Pineda*, 471 U.S. at 451 (ruling that the Eighth Circuit improperly reversed the BIA's denial of a motion to reopen to apply for suspension of deportation, since the BIA's decision was not an "unreasoned or arbitrary exercise of discretion"); see also *Yousif* v. *INS*, 794 F.2d 236, 241 (6th Cir. 1986) (quoting *Rios-Pineda* and indicating that motion to reopen to apply for asylum or withholding of deportation will be upheld unless it was "an 'unreasoned or arbitrary exercise of discretion' " or "contrary to law"). Put another way, the denial of a motion to reopen must be affirmed "unless it 'was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimina-

tion against a particular race or group.'" *Williams* v. *INS*, 773 F.2d 8, 9 (1st Cir. 1985) (quoting *Le Blanc* v. *INS*, 715 F.2d 685, 693 (1st Cir. 1983), and *Balani* v. *INS*, 669 F.2d 1157, 1161 (6th Cir. 1982)); accord, *e.g.*, *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1265 (7th Cir. 1985); *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966); see also *Dolores* v. *INS*, 772 F.2d 223, 225 (6th Cir. 1985) (citing *Balani* for proposition that "[t]he decision on [a] motion to reopen * * * deportation proceedings in order to apply for asylum rests in the sound discretion of the INS").

2. a. This Court's decisions confirm the limited standard of review that we urge. In *Jong Ha Wang*, a 1981 decision, this Court summarily reversed the Ninth Circuit in a case raising an issue similar to the present one. The alien in *Jong Ha Wang* filed a motion to reopen to apply for suspension of deportation on grounds of extreme hardship. The Ninth Circuit, sitting en banc, ruled that the extreme hardship statute should be liberally construed and that, under such a construction, the alien had set out a prima facie case and was entitled to reopening. 622 F.2d 1341 (1980). In reversing, this Court rejected the Ninth Circuit's conclusion that reopening was required simply because the alien appeared to have established a prima facie case. The Court quoted with approval the dissent in the Ninth Circuit in a companion case to *Jong Ha Wang*, which explained the need for permitting the Attorney General and his delegates to be selective in deciding when to grant a motion to reopen:

> "If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations."

450 U.S. at 144 n.5 (quoting *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc) (Wallace, J., dissenting)).

Subsequently, in *Phinpathya*, the Court again discussed the BIA's broad discretion in ruling on motions to reopen. The issue in *Phinpathya* was whether the alien's three-month trip abroad had broken the continuity of her physical presence in this country, making her ineligible for suspension of deportation under 8 U.S.C. 1254(a)(1). The Court, in holding that it did, rejected the alien's claim that the case was moot because she had been here continuously for seven years after returning from her trip. It noted that although the alien had filed a motion to reopen her deportation proceeding, "granting of the motion is entirely within BIA's discretion" (464 U.S. at 188 n.6).[16]

Recently, in *Rios-Pineda*, this Court reversed an Eighth Circuit decision ordering the BIA to reopen deportation proceedings to consider the hardship claims of two aliens who had filed frivolous appeals and violated the immigration laws. In holding that

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[16] Although the Reform Act overruled the holding in *Phinpathya* on another issue (see note 14, *supra*), the Court's observations about motions to reopen remain fully authoritative.

the BIA did not abuse its discretion in denying the aliens' motion to reopen, the Court explained (471 U.S. at 449) that "granting a motion to reopen is a discretionary matter with BIA" and that such a motion may be denied as a matter of discretion even if a prima facie case of eligibility for relief has been made. Upon reviewing the record in the case, the Court found (*id.* at 451-452) that the case "[did] not involve the unreasoned or arbitrary exercise of discretion" and that "the BIA's explanation of its decision was grounded in legitimate concerns about the administration of the immigrations laws." The Court further observed (*id.* at 452) that "it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review."

b. Although *Jong Ha Wang*, *Phinpathya*, and *Rios-Pineda* all involved motions to reopen to seek suspension of deportation, the various circuits that have addressed the question have repeatedly applied the holdings of those cases to motions to reopen to seek asylum or withholding of deportation. See, *e.g.*, *Ghadessi* v. *INS*, 797 F.2d 804, 809 (9th Cir. 1986) (Jameson, J., concurring); *id.* at 810 (Poole, J., dissenting); *Ganjour* v. *INS*, 796 F.2d 832, 837-838 (5th Cir. 1986); *Yousif* v. *INS*, 794 F.2d 236, 241 (6th Cir. 1986); *Haftlang* v. *INS*, 790 F.2d 140, 143 (D.C. Cir. 1986); *Bahramnia* v. *INS*, 782 F.2d 1243, 1245-1246 & n.15 (5th Cir. 1986) (relying on *Rios-Pineda* and noting that while case at issue involved motion to reopen to apply for withholding of deportation and asylum whereas the aliens in *Rios-Pineda* were seeking suspension, "the difference [was] immaterial"), cert. denied, No. 85-7154 (Nov. 3, 1986); *Sanchez* v. *INS*, 707 F.2d 1523, 1527 n.9 (D.C. Cir. 1983). See also *Minwalla* v. *INS*, 706 F.2d 831, 834 (8th Cir. 1983) (standard of review in context of motion to reopen to apply for asylum is abuse of discretion); *Kashani* v. *INS*, 547 F.2d 376, 378 (7th Cir. 1977) (standard of review in motion to reopen where alien claims fear of persecution is abuse of discretion). Cf. *Ananeh-Firempong* v. *INS*, 766 F.2d 621, 624-626 (1st Cir. 1985) (distinguishing withholding of deportation from various forms of discretionary relief but stating, citing *Rios-Pineda*, that the BIA's denial of a motion to reopen to apply for withholding of deportation must be affirmed if it is "reasonable," *i.e.*, not "arbitrary, capricious, [or] an abuse of discretion").

The logic of the cases applying this Court's decisions in *Rios-Pineda*, *Jong Ha Wang*, and *Phinpathya* to motions to reopen involving withholding of deportation and asylum is unassailable. The reopening regulations (8 C.F.R. 3.2, 3.8(a)) are applicable without regard to the type of relief being sought.[17] In addition, the need to allow the BIA to weed out non-meritorious claims remains the same regardless of the type of relief being sought. Moreover, the Attorney General and his delegates have expertise in reviewing and evaluating claims involving asylum

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[17] Indeed, if anything, the requirements for reopening in the context of asylum are more exacting, since the alien must comply not only with Sections 3.2 and 3.8(a) but also with Section 208.11. See *Duran* v. *INS*, 756 F.2d 1338, 1339-1340 n.1 (9th Cir. 1985) (Section 208.11 requirements are in addition to those under Sections 3.2 and 3.8(a)); *Sanchez* v. *INS*, 707 F.2d 1523, 1526 & n.7 (D.C. Cir. 1983) (same); see also *Chavez* v. *INS*, 723 F.2d 1431, 1433 (9th Cir. 1984) (rejecting argument that under Section 208.11, a motion to reopen to apply for asylum should be granted upon a lesser showing than that required for other types of motions to reopen).

and withholding of deportation. See, *e.g.*, *Saballo-Cortez* v. *INS*, 761 F.2d 1259, 1266 (9th Cir. 1985) (principle of deference to agency expertise applicable in reviewing BIA's denial of application for withholding of deportation and asylum); *Marroquin-Manriquez* v. *INS*, 699 F.2d 129, 133 n.5 (3d Cir. 1983) (noting "the necessary application of expertise implicated in the determination that a fear of persecution is well-founded"), cert. denied, 467 U.S. 1259 (1984); see also *Achacoso-Sanchez*, 779 F.2d at 1265. That expertise, which is not possessed by the courts, provides an added reason for a reviewing court *not* to substitute its judgment for that of the BIA.

c. The appropriateness of a narrow standard of judicial review in the context of motions to reopen is also confirmed by two related lines of cases: (1) administrative law authorities outside of the immigration area, and (2) analogous criminal law cases.

It is a well established principle of administrative law that the refusal to reopen administrative proceedings is afforded great judicial deference.[18] The party seeking reopening bears a "heavy burden," and the courts will not order reopening "except in the most extraordinary circumstances." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974); *Cities of Campbell* v. *FERC*, 770 F.2d 1180, 1191 (D.C. Cir. 1985). In order to avoid reopening in virtually every case, it is "almost a rule of necessity" that administrative

[18] Numerous agencies other than the INS also have regulatory provisions authorizing reopening. See, *e.g.*, 18 C.F.R. 385.716 (Federal Energy Regulatory Commission); 29 C.F.R. 102.48 (National Labor Relations Board); 40 C.F.R. 209.7(b) (Environmental Protection Agency).

agencies must ordinarily deny reopening despite the existence of some new fact. *ICC* v. *Jersey City*, 322 U.S. 503, 514 (1944). As this Court has stated (*id.* at 514-515), if litigants could "demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." Accord, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 554-555 (1978); *United States* v. *ICC*, 396 U.S. 491, 520-521 (1970); *Nance* v. *EPA*, 645 F.2d 701, 717 (9th Cir.), cert. denied, 454 U.S. 1081 (1981). Because of the need for finality, a refusal to reopen proceedings despite the assertion of some new event will not be disturbed except upon "a showing of the *clearest* abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946) (emphasis added); accord, *e.g.*, *Mobil Oil Corp.* v. *ICC*, 685 F.2d 624, 631 (D.C. Cir. 1982); *Duval Corp.* v. *Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981).[19]

[19] These principles apply *a fortiori* in the present context, since immigration officials are given a particularly high degree of deference. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 23 ("[The] vesting of discretion in the Attorney General is quite typical in the immigration area."); *INS* v. *Miranda*, 459 U.S. 14, 19 (1982) (noting that "the INS is the agency primarily charged by Congress to implement the public policy underlying [the immigration] laws" and that "[a]ppropriate deference must be accorded its decisions"); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976)) (" '[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.' "); *Mathews* v.

Even in the criminal context,[20] reopening a proceeding to consider new evidence is an extraordinary remedy. Thus, a criminal defendant who moves for a new trial based on newly discovered evidence has an exceedingly difficult burden. Such a motion is "not favored" and is "viewed with great caution." *United States* v. *Vergara*, 714 F.2d 21, 22 (5th Cir. 1983) (quoting authority); accord, *e.g.*, *United States* v. *Davis*, 604 F.2d 474, 483 (7th Cir. 1979). A trial court's refusal to order a new trial based on newly discovered evidence will not be reversed absent an abuse of discretion. Moreover, such a motion will not be granted unless the new evidence could not have been discovered prior to trial and is so compelling that it would probably result in an acquittal. See, *e.g.*, *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976) (noting that the "standard generally applied by lower [federal] courts in evaluating motions for new trial * * * based on newly discovered evidence" is "the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal"); *United States* v. *Massa*, 804 F.2d 1020, 1022 (8th Cir. 1986); *United States* v. *Sutton*, 767

Diaz, 426 U.S. 67, 81-82 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972). As a distinguished commentator has noted, the Act "is shot through with provisions that 'the Attorney General may, in his discretion,' do something for an alien. The underlying scheme of the Act is to avoid conferring legal rights upon aliens." 2 K. Davis, *Administrative Law Treatise* § 8:10, at 200 (2d ed. 1979).

[20] A deportation proceeding, of course, is a civil matter. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984). It is "intended to provide a *streamlined* determination of eligibility to remain in this country, nothing more" (*ibid.* (emphasis added)).

F.2d 726, 728 (10th Cir. 1985).[21] There is no reason why a motion to reopen a deportation proceeding should be granted more liberally than a similar motion in a criminal case.

B. The Court Of Appeals Has Adopted Rules That Improperly Limit The BIA's Discretion In Ruling On Motions To Reopen

Notwithstanding this Court's pronouncements, the court of appeals in the present case adopted two principles that would severely undermine the BIA's discretion in ruling on motions to reopen. First, the court held that when the BIA denies a motion to reopen on the ground that the alien has not established a prima facie showing of entitlement to relief, the issue on review is whether the BIA's decision is "correct" (Pet. App. 7a). Second, the court held that the BIA, in reviewing motions to reopen, must draw all reasonable inferences in favor of the alien (*id.* at 9a-10a). Although the present case involves a motion to reopen to apply for asylum or withholding of deportation, the court did not limit its rationale to such motions. Rather, its rules appear to apply regardless of the underlying relief being sought.[22] We submit that the court's rules impermissibly un-

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[21] In *Sutton*, the trial court denied the motion for a new trial based on newly discovered evidence (and denied a motion for an evidentiary hearing on the motion) without any discussion. 767 F.2d at 728-729. Cf. *Jay* v. *Boyd*, 351 U.S. 345 (1956).

[22] See *Platero-Reymundo* v. *INS*, 807 F.2d 865, 867 (9th Cir. 1987) (citing decision below and holding that the BIA was "correct" in ruling that the alien did not establish a prima facie showing of entitlement to a new grant of voluntary departure).

dermine the BIA's broad discretion in ruling on motions to reopen.[22]

1. The Ninth Circuit's rule that the BIA's denial of a motion to reopen for lack of a prima facie case must be reversed if it is not "correct" is totally unprecedented. The court's standard constitutes de novo review, a standard that gives no deference whatsoever to the BIA. See generally 2 S. Childress

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[22] Unfortunately, the present case is not an isolated instance of the Ninth Circuit's refusal to follow this Court's teachings in *Jong Ha Wang*, *Phinpathya*, and *Rios-Pineda*. In our petition for a writ of certiorari in *INS* v. *Fazelihokmabad*, No. 86-1008, petition for cert. pending, at 12-14 (a copy of which was previously provided to respondent), we discuss numerous cases in which the Ninth Circuit has (in our view, improperly) second-guessed the BIA. Indeed, several Ninth Circuit judges have stated that their circuit has repeatedly engaged in improper de novo review of the BIA's rulings. In a recent dissent from the denial of rehearing en banc in *Saldana* v. *INS*, 762 F.2d 824 (1985), amended, 785 F.2d 650 (1986) (holding that the BIA erred in denying a motion to reopen deportation proceedings), Judge Sneed, writing for himself and six other judges, criticized the standards of judicial review that have been adopted by various Ninth Circuit panels in immigration cases (793 F.2d 222 (1986)). Judge Sneed observed (*id.* at 224) that the court has "passed beyond insisting on a sensible number of tracks that will establish that true discretion was exercised" and instead has "entered upon the task of providing the narrow pathway down which an agency must walk." He pointed out (*ibid.*) that "[d]iscretion so confined ceases to be true discretion." Instead, "[t]he agency in which discretion once was vested by this means becomes the puppet of the court" (*ibid.*). After discussing a number of specific Ninth Circuit immigration cases, Judge Sneed concluded (*id.* at 225) that the Ninth Circuit has "approach[ed] de novo review" and that its decisions have been contrary to the immigration statutes and Supreme Court precedents.

& M. Davis, *Standards of Review* § 15.2, at 263 (1986) ("Under the standard called *de novo* review, the court is charged to affirm only if it agrees with the decision under review—that is, if it finds that the decision is the correct one. * * * The court is not bound by the agency decision at all."). This Court has stated, however, that "in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed." *Consolo* v. *FMC*, 383 U.S. 607, 619 n.17 (1966). See also *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). Indeed, even in the criminal context, "judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment." *Woodby* v. *INS*, 385 U.S. 276, 282 (1966). A reviewing court in a criminal case generally "does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt," but rather asks only "whether the judgment is supported by substantial evidence." *Ibid.* (footnote omitted).

In the context of motions to reopen deportation proceedings, Congress did not provide for reopening at all, let alone articulate a de novo standard of review of the Attorney General's wholly discretionary decision whether to reopen. And this Court, far from suggesting that de novo review is appropriate, has made clear that the reviewing court may *not* engage in de novo review of the BIA's denial of a motion to reopen. *Rios-Pineda*, 471 U.S. at 451. Similarly, until the present case, the circuits addressing the issue had repeatedly held that the BIA's determination of whether an alien seeking reopening had established a prima facie case of eligibility for asylum and withholding of deportation was entitled to

deference. See, *e.g.*, *Ganjour* v. *INS*, 796 F.2d 832, 837-838 (5th Cir. 1986); *Haftlang* v. *INS*, 790 F.2d 140, 144 (D.C. Cir. 1986); *Bahramnia* v. *INS*, 782 F.2d 1243, 1245, 1249 (5th Cir. 1986), cert. denied, No. 85-7154 (Nov. 3, 1986); *Maroufi* v. *INS*, 772 F.2d 597, 598-601 (9th Cir. 1985).

In the present case, the court of appeals announced a de novo review standard that was not even urged by the alien.[24] The court relied primarily on *Ghadessi* v. *INS*, 797 F.2d 804, 806 (9th Cir. 1986). However, there were three opinions in *Ghadessi*, and the opinion cited by the panel for the proposition that a prima facie case determination is reviewed for "correct[ness]" is the minority opinion on the issue. Two judges on the panel made clear that the proper standard of review was not de novo review but abuse of discretion. See 797 F.2d at 809 (Jameson, J., concurring); *id.* at 809-810 (Poole, J., dissenting).[25] Thus, the court's erroneous de novo review standard was neither urged by respondent nor previously adopted by any other court.

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[24] Respondent conceded below that the BIA has discretion in ruling on motions to reopen and cited *Rios-Pineda* as the governing authority (Abudu C.A. Br. 25).

[25] The court also relied (Pet. App. 7a) on a law review article, Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 Admin. L. Rev. 239, 268 (1986). But the cited page of the article was in a section discussing issues of law (*id.* at 267-270). And even as to pure questions of law, the author noted (*id.* at 268) that "[a] clear majority of recent Supreme Court cases involving interpretation of regulatory legislation have adhered to the policy of giving weight to agency views."

The court also cited 5 U.S.C. 706(2)(A). But that provision, the "arbitrary and capricious" standard of review contained in the Administrative Procedure Act, provides no support for a standard of de novo review of the BIA's ruling on a motion to reopen.

Finally, the court cited *Larimi* v. *INS*, 782 F.2d 1494 (9th Cir. 1986). The *Larimi* court made the unexceptional and obvious point that the BIA's denial of a motion to reopen for failure to make out a prima facie case "is always an appropriate exercise of discretion if the determination concerning the prima facie case is correct" (*id.* at 1496). The court did *not* state the converse point, *i.e.*, that a reviewing court's disagreement with the BIA over whether a prima facie case was established is necessarily reversible error. To the contrary, the court recognized that the proper standard was abuse of discretion (*ibid.*).

2. The court of appeals likewise erred in holding that the BIA must draw all inferences in favor of the alien. Such a rule finds no counterpart even in the criminal law (see pages 28-29, *supra*). Contrary to the court of appeals' statement (Pet. App. 10a (emphasis added)), the BIA is not performing merely a "*limited* screening function." Rather, it is exercising its " 'right to be restrictive' " and it therefore must have " 'some latitude in deciding when to reopen a case.' " *Jong Ha Wang*, 450 U.S. at 144 n.5 (quoting *Villena*, 622 F.2d at 1362 (Wallace, J., dissenting)). Requiring the BIA to accept the alien's suggested interpretation of every ambiguous fact would undermine the BIA's discretion, in a manner incompatible with *Jong Ha Wang*, *Phinpathya*, and *Rios-Pineda*.

In addition to conflicting with this Court's decisions involving motions to reopen deportation proceedings, the Ninth Circuit's rule on inferences is contrary to the principle of administrative law that where it is fairly possible to draw differing inferences from the evidence, the one drawn by the agency cannot be set aside, "even though the court could draw a different inference." *Adolph Coors Co.* v.

FTC, 497 F.2d 1178, 1184 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975). As this Court long ago stated, "[t]he weight to be given to the facts and circumstances * * *, as well as the inferences reasonably to be drawn from them, is for the [administrative agency]." *FTC* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52, 63 (1927); accord, *e.g.*, *Local One, Amalgamated Lithographers* v. *NLRB*, 729 F.2d 172, 177 (2d Cir. 1984); *Hedstrom Co.* v. *NLRB*, 629 F.2d 305, 316 (3d Cir. 1980) (en banc), cert. denied, 450 U.S. 996 (1981); *National Macaroni Mfrs. Ass'n* v. *FTC*, 345 F.2d 421, 426 (7th Cir. 1965).

The court of appeals derived its rule that inferences must be drawn in the alien's favor by analogizing a motion to reopen to a motion for summary judgment. But even that inapt analogy, when properly applied, supports the conclusion that all inferences should be drawn *against* the alien. The party moving for summary judgment is seeking to terminate an ongoing judicial proceeding before the opponent has had a trial. A motion for summary judgment should not be granted if there are *any* disputed factual issues, and it therefore follows that all inferences should be drawn *against* the moving party. See generally *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962) (emphasis added) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party *opposing* the motion."). Similarly, an alien moving to reopen is attempting to disrupt the orderly completion of the administrative process in order to obtain a further hearing. Because "the Government has a legitimate interest in creating official procedures for handling motions to reopen deportation proceedings so as readily to identify those cases raising new and meritorious considerations" (*Jong Ha Wang*, 450 U.S. at 145), it follows that all inferences should, if anything, be drawn *against* the alien. At a minimum, the BIA should have discretion to determine which inference to draw from the alien's evidence.

C. The BIA's Refusal To Reopen Respondent's Deportation Proceedings Was Reasoned And Not Arbitrary And Must Therefore Be Upheld

The BIA denied respondent's motion to reopen his deportation proceedings on two grounds, either of which is independently sufficient to justify its refusal to reopen. First, the BIA ruled that respondent did not offer a reasonable explanation for his failure to apply for asylum and withholding of deportation at his deportation hearing (Pet. App. 17a-18a). Second, the BIA found that respondent failed to make a prima facie showing of eligibility for asylum or withholding of deportation (*id.* at 18a-20a).[28] The BIA's decision denying reopening, which was based on a careful review of the materials submitted by respondent (*id.* at 17a), was reasoned and not arbitrary. Accordingly, the court of appeals erred in remanding the case for an evidentiary hearing.

1. The BIA's first ground for denying reopening stemmed from respondent's failure to provide an

[28] As we have pointed out (note 9, *supra*), the court of appeals did not consider the BIA's first basis for denying reopening and, accordingly, erroneously stated (Pet. App. 6a) that the sole issue was whether respondent made out a prima facie case for reopening.

adequate explanation of why he did not previously apply for asylum or withholding of deportation. The BIA reasoned that the visit from the Ghanian official was the only fact alleged by respondent in his motion to reopen that post-dated the deportation hearing, and that the visit "was [not] by itself so alarming that it explains the respondent's failure to apply for asylum at the hearing" (Pet. App. 17a). Thus, the BIA concluded, respondent failed to meet the regulatory requirements for reopening (*id.* at 17a-18a). See 8 C.F.R. 208.11 (motion to reopen to request asylum "must reasonably explain the failure to request asylum prior to the completion of the * * * deportation proceeding"); *In re Escobar*, 18 I & N Dec. 412, 415 (BIA 1983) (motion to reopen to request asylum or withholding of deportation "will not be granted where * * * the alien has not reasonably explained his failure to assert the claim prior to completion of the deportation hearing"); cf. 8 C.F.R. 208.3(b) (request for asylum shall also be considered request for withholding of deportation). See also 8 C.F.R. 3.2 (motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing * * *"). The BIA's ruling was clearly a reasonable one.

According to his affidavit, respondent first discovered that his visitor, Abukari Alhassan,[27] was in

[27] Alhassan, an official with the Rawlings regime, had previously held a high position with a former Ghanian government, and, as a result, had spent a year in jail (2 R. 29). Nevertheless, after his release, he "recanted his previous ties and joined the Rawlings' regime" (*ibid.*). Respondent's own evidence thus undermines any assumption that even *officials* of former governments will inevitably suffer persecution.

the United States when respondent received a telephone call from his brother Baba. Baba told respondent that he had given Alhassan respondent's telephone number.[28] The asserted reason for the visit was a social one: Alhassan and respondent had known each other for many years. Respondent speculated, however, that Alhassan wanted him to return to Ghana "too badly" and that the reason was "so that [Rawlings] could try to get me to betray my brother and [Hamidu] and reveal their present whereabouts so that Rawlings' men could quell the alleged conspiracy [to overthrow his government]." 2 R. 29-31.

The BIA refused to draw ominous implications from Alhassan's visit. It stated that "respondent's visitor was admittedly a long-time friend of the respondent's who in fact may have been paying a purely social visit" (Pet. App. 17a). This observation, of course, was plainly reasonable; even the court of appeals (*id.* at 11a) and respondent (Br. in Opp. 11) acknowledged that the evidence concerning the visit could be viewed as "benign" or "ambiguous."[29] Moreover, Alhassan's questions concerning respond-

[28] Respondent claimed that his brother had given the telephone number to the Ghanian official in order to "avoid suspicion, and because [the brother] knew that as a physician [respondent] would be easy to find * * *" (2 R. 29). The fact that respondent's own brother freely disclosed respondent's whereabouts to the official casts doubt on the assertion that respondent is targeted for persecution.

[29] Significantly, the visit occurred in the Spring of 1984 (2 R. 29), but respondent did not file his motion to reopen until February 1985 (2 R. 20). Apparently, the purported threatening nature of the visit was not immediately apparent to respondent.

ent's brother and friends can be easily explained; since Alhassan had served in the same prior regime in which respondent's brother and friends had served (or been associated with), they presumably were all well-acquainted. Alhassan's inquiries concerning them were thus fully consistent with a purely social visit.

Similarly, Alhassan's repeated requests that respondent return to Ghana were not necessarily ominous. While respondent expressed doubt in his motion to reopen that Alhassan wanted him to return to Ghana because of his medical skills (2 R. 30), that may have been precisely the reason for Alhassan's requests. Indeed, respondent conceded that former Ghanian governments had also urged him to return to Ghana (2 R. 28). For example, in 1973, the Minister of Health under a former government told respondent that he could have a good position with the government, wrote a memorandum to that effect, and placed it in the medical division files. In 1979, respondent was told that a good job awaited him in Ghana and that the Minister of Health had "upgraded" his personnel recommendation "to an 'actively try to recruit' classification." *Ibid.* And, contrary to respondent's assertion that "[t]here is not a shortage of good doctors in Ghana" (2 R. 30), the need for good doctors in such developing nations is well known.[30] If Alhassan had been pursuing re-

[30] Indeed, information from public sources flatly contradicts respondent's assertion. In 1981, there was one physician for every 6,760 persons in Ghana, compared, for example, with one physician for every 500 persons in the United States during that same year. World Bank, *World Development Report: 1986*, at 234, 235 (Oxford Univ. Press). In 1983, the life expectancy at birth in Ghana was 50.3 years for males and 53.7 years for females. 1 G. Kurian, *Encyclopedia of the Third World* at 743 (3d ed. 1987). Ghana has numerous "[m]ajor prevalent diseases," and its "[h]ealth problems are complicated by nutritional deficiencies, disease-carrying insects, water pollution and poor sanitation." *Ibid.*

spondent not for his medical skills but because of his relationship to his exiled brother or his friendship with Lt. Col. Hamidu, then Alhassan would logically have made similar inquiries of respondent's brother Baba or Hamidu's daughter, both of whom lived in the United States. Indeed, by giving Alhassan respondent's telephone number, Baba showed that he was a useful source of information. Yet respondent did not allege that either Baba or Hamidu's daughter had ever said that they had been questioned by Alhassan concerning the whereabouts of Hamidu or the brother-in-exile.[31]

Since the sole item of evidence post-dating the deportation hearing is of dubious value and could be viewed as benign (see page 37, *supra*), it follows that the primary evidence to support respondent's claim must have been in existence at the time of his deportation hearing, when he made a deliberate decision not to seek asylum or withholding of deportation. Because respondent's sole explanation for his previous failure to apply for such relief is that Alhassan's visit was the event that motivated the application, the BIA was obviously correct in ruling that respondent had

[31] Respondent acknowledged that he was "close to [Hamidu's] daughter who lives in the greater Los Angeles area" (2 R. 27), the same city in which respondent resides (2 R. 21). Presumably, if she had been questioned by Alhassan, she would have told respondent. Similarly, it is reasonable to assume that Baba would have told respondent if Alhassan had questioned him concerning the whereabouts of Hamidu or the exiled brother.

not adequately explained his failure to apply for such relief during his deportation hearing. See 8 C.F.R. 208.11. In light of respondent's failure to meet the regulatory requirements for reopening, the BIA did not abuse its discretion in denying his motion to reopen. See generally *Conti* v. *INS*, 780 F.2d 698, 701 (7th Cir. 1985) (quoting *Tupacyupanqui-Marin* v. *INS*, 447 F.2d 603, 607 (7th Cir. 1971) ("[T]he failure to comply with the procedural requirements for a valid motion to reopen 'alone is normally sufficient to overcome the contention that the denial of such a motion was an abuse of discretion.' ").

2. As a second reason for denying the motion to reopen, the BIA found that respondent had failed to set forth a prima facie case of eligibility for asylum or withholding of deportation. The Ninth Circuit refused to give any deference to the BIA's determination, asserting that "[t]he BIA's action would be in accordance with law only if its conclusion that a prima facie case was not established is *correct*" (Pet. App. 7a (emphasis added)).

The requirement that an alien set out a prima facie case as part of his motion to reopen serves an important function of enabling the BIA to identify cases having genuine merit. See, *e.g.*, *Jong Ha Wang*, 450 U.S. at 145. As we have explained, determining whether a prima facie case has been established is a matter within the broad discretion of the BIA. It is *not* an issue that is subject to de novo judicial review.[32]

[32] Indeed, were it otherwise, aliens would obviously be encouraged to inundate the courts of appeals with requests for such review. The nation's 67 immigration judges and the BIA adjudicate tens of thousands of deportation cases each year. During the six-month period between October 1, 1986, and March 31, 1987, the BIA decided 114 motions to reopen (not including appeals from denials of such motions by immigration judges). During that same period, the immigration judges decided close to 1500 motions to reopen. The rules adopted by the court below would almost certainly encourage many more aliens to file such motions and to seek judicial review if denied relief.

The BIA's ruling that respondent failed to establish a prima facie case for asylum and withholding was based on a careful review of the evidentiary materials. The BIA described respondent's evidence in detail (Pet. App. 14a-20a). Its opinion reveals that it studied, analyzed, and reflected upon the various points raised by respondent. Cf. *Luciano-Vincente* v. *INS*, 786 F.2d 706, 708-709 (5th Cir. 1986) (quoting *Osuchukwu* v. *INS*, 744 F.2d 1136, 1142-1143 (5th Cir. 1984)) (noting, in the context of direct review of denial of suspension of deportation, that the BIA is required simply to " 'consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted' ").

The BIA gave several reasons for its conclusion that respondent had failed to establish a prima facie case. Having already explained why respondent's "new" evidence was of dubious value (Pet. App. 17a), the BIA proceeded to review the remaining evidence. First, the BIA acknowledged respondent's reference to his brother, now in exile, who was an employee of a previous government and who allegedly had his house surrounded by troops. The BIA correctly pointed out, however, that "[n]o affidavit from the brother has been offered * * * and no details have been provided as to the alleged troop actions around his house, or as to the circumstances

of his escape and exile" (*id.* at 19a). The court of appeals did not and could not take issue with the BIA's observations concerning these evidentiary deficiencies in respondent's materials.

Second, the BIA pointed out (Pet. App. 20a) that respondent's own purported fear derived from his "relationships" with purported enemies of Ghana, yet respondent provided no details as to his relationship with most of those people. Moreover, the BIA observed (*ibid.*), respondent had not "adequately explained how his relationships with these individuals would result in persecution to *himself* should he return to his native land" (*ibid.* (emphasis added)). Again, the court did not dispute the BIA's observation about these evidentiary gaps. Nor could it. Neither the documentary material nor any other objective evidence offered by respondent states that the Rawlings government perceives the relatives and friends of its enemies as enemies themselves simply because of their relationship, or that it makes a practice of persecuting such relatives and friends as a means of retaliating against its enemies. And respondent does not allege that, apart from his "associations," the Ghanian government has any interest in him because of his *own* political opinions or activities.[33] See, *e.g.*, *Haftlang*, 790 F.2d at 144 (BIA not required to reopen where alien failed to explain how harassment suffered by his parents made *him* a likely victim of persecution); *Shoaee* v. *INS*, 704 F.2d 1079, 1084 n.5 (9th Cir. 1983) ("[I]t is pure conjecture to surmise the respondent would be persecuted because of his brother's particular situation in Iran.") (quoting BIA with approval).

[33] Indeed, it is not even clear from his affidavit whether respondent holds any strong political views at all.

Third, the BIA addressed respondent's allegation that the Ghanian government would attempt to elicit information from him about his associates, and that "because of his associations he would be considered an 'advance man' for these individuals' attempt to stage a coup" (Pet. App. 20a). It observed, however, that respondent's "conjectures [were] speculative at best" and that "[h]is mere assertions of possible threats are lacking in specific, objective detail and do not constitute a prima facie showing of eligibility for either asylum [or] withholding of deportation" (*ibid.*). The BIA's reasoning is clearly correct. Respondent provided no evidence to support his inherently implausible theory that his reluctant and much postponed return to Ghana would be considered that of an "advance man" for an attempted coup. This was at most a conclusory allegation, unsupported by any evidence. See *Haftlang*, 790 F.2d at 144 ("[R]equiring the Board to reopen deportation proceedings based upon * * * wholly conclusory evidence threatens to overwhelm the Board with such motions.").

In short, the BIA's conclusion that respondent did not make out a prima facie case of eligibility for asylum or withholding of deportation is a reasoned one. It was based on a careful and accurate analysis of respondent's evidence. The BIA's denial of reopening because of respondent's insufficient evidence was therefore not an abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

No. 86-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,
vs.

ASSIBI ABUDU,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE TO BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether reasonable inferences from the evidence presented on a Motion to Reopen to apply for asylum are to be viewed in the manner most favorable to a granting of an evidentiary hearing.

2. Is the BIA required to reopen the proceedings for an evidentiary hearing when the BIA decides a Motion to Reopen deportation proceedings for an asylum application, once the alien shows a prima facie case of a well-founded fear of persecution and the BIA neither addresses nor decides whether the application should be granted or denied in an exercise of discretion?

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No. 86-1128

IN THE

Supreme Court of the United States

October Term 1987

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,
vs.

ASSIBI ABUDU,
Respondent.

RESPONSE TO BRIEF ON THE MERITS

OPINIONS BELOW

The opinions below have been correctly reported by the Petitioner.

JURISDICTION

Respondent concurs in the jurisdictional statement set out by the Petitioner.

STATUTES AND REGULATIONS INVOLVED

In addition to those included in Petitioner's Brief, the following statutes and regulations are involved.

5 U.S.C. § 706 provides in pertinent part as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

8 U.S.C. § 1101(a)(42)(A) provides in pertinent part:

The term 'refugee' means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to and is unable or unwilling to avail himself or herself of, the protection of that country because of persecution or a well-founded fear of persecution on account of . . . or political opinion . . . .

8 U.S.C. § 1254(a), as germane, provides:

[T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien . . .

(1) . . . has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character, and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . . .

8 C.F.R. § 208.7 in pertinent part provides:

"[T]he District Director shall in all cases request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State . . . ."

8 C.F.R. § 208.10 as pertinent provides:

"(b) When the asylum request is filed, the hearing will be adjourned for the purpose of requesting an advisory opinion from BHRHA. . . . The BHRHA opinion, unless classified under Executive Order No. 12356, will be made part of the record, and the applicant shall be given an opportunity to inspect, explain, and rebut it."

STATEMENT

A. Dr. Abudu's Presence in the United States

Respondent Assibi Abudu ("Dr. Abudu"), a native and citizen of Ghana, came to the United States at age 21 in 1965 to study. By 1973, he had earned a Bachelor's Degree and was attending medical school. Dr. Abudu spent his 1973 summer vacation in Ghana. In July, 1973, he re-entered the United States to continue his medical studies. Dr. Abudu's authorized stay was until February, 1976. (2 R 21, 28)[1]

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[1] 2 R refers to the certified administrative record II, the record on the order at issue in this proceeding, the Motion to Reopen. 1 R refers to the certified administrative record I, the record on the Order of Deportation.

B. The Lower Court Proceedings

On August 7, 1981, the Immigration and Naturalization Service ("Service") issued an Order to Show Cause to commence deportation proceedings against Dr. Abudu, charging him with deportability based upon convictions in the California Supreme Court of obtaining or attempting to obtain narcotic drugs (Demoral) by fraud. During the proceedings a lodged charge was added, charging deportability for having remained longer than authorized. (1 R 49, 50, 64, 82, 82-A).

On November 10, 1981, Dr. Abudu denied deportability and designated England as the country of deportation, should deportation become necessary. Dr. Abudu said that he was afraid for his life in Ghana because of his political opinion (1 R 45, 46). On April 29, 1982, deportability on the overstay charge was admitted, and his previous counsel announced that he would not be filing an application for asylum. Instead, previous counsel requested adjustment of status to a lawful permanent resident because Dr. Abudu was the spouse of a United States citizen. On July 1, 1982, the Immigration Judge found Dr. Abudu deportable and denied the application for adjustment of status on statutory grounds of eligibility, *i.e.*, conviction of a drug-related offense. [8 U.S.C. § 1182(a)(23); 8 U.S.C. § 1251(a)(11)]. (1 R 26-30, 52, 53, 54, 58, 59, 60).

After his appeal to the Board of Immigration Appeals ("BIA") was dismissed, (1 R 2-4), Respondent changed attorneys. Speaking through new counsel, he petitioned the Ninth Circuit Court of Appeals to review the Order of Deportability. At that time, Dr. Abudu filed with the BIA a Motion to Reopen to Apply for Asylum. Reopening was denied, (2 R 1-6), and the Ninth Circuit was requested to also review that denial. The two reviews were consolidated.

The Ninth Circuit sustained the Order of Deportability; but, it reversed the denial of the Motion to Reopen and remanded the case for an evidentiary hearing. 802 F.2d 1096, 1099, 1102.

C. The Motion to Reopen

Dr. Abudu filed his Motion to Reopen to request asylum after an official of the Ghanaian government made an unsolicited visit to Dr. Abudu's home and tried to persuade him to return to Ghana. That visit convinced him that the government sought his presence to extricate from him, through torture and imprisonment, the locations of close relatives and friends who are exiled dissidents and known enemies of the current regime. This visit combined with other prior events to heighten Dr. Abudu's fear for his life if he returned to Ghana. (2 R 29, 30).

These events begin with the history of violent coups by which leaders have taken control of Ghana since President Achaempong assumed power in 1972. The current leader, Flight Lieutenant ("Flt. Lt.") Jerry Rawlings, killed President Achaempong in a coup in 1979, but relinquished power to Dr. Limann three months later. Flt. Lt. Rawlings retook the government in December, 1981, and continues to rule Ghana. The Rawlings government's treatment of its political dissenters has been: imprisonment, maltreatment of prisoners, disappearances, and killings. (2 R 25, 26, 32, 33, 34, 42, 43, 46-54, 57).

Dr. Abudu's family and friends in Ghana were important participants in the regimes that were ousted by Flt. Lt. Rawlings. The brother with whom Dr. Abudu shares the exact same name (referred to as "Ph.D. Abudu" to avoid confusion of identities) is an economist. He was a member of the World Bank and an economic advisor to both regimes that Rawlings ousted. Dr. Abudu's childhood

friend Joshua Hamidu was a Lieutenant Colonel and Minister of Defense in the Limann government. Two other close friends served the Limann government in high posts. Dr. Francis K. Badgie was an Ambassador, and Basko Alhassan Kante was Minister of State. (2 R 26, 27, 34-38).

During his 1973 summer vacation in Ghana, Ph.D. Abudu, Joshua Hamidu and Dr. Abudu had made the social rounds of Ghana. Dr. Abudu met many government officials, including the Minister of Health, who offered Dr. Abudu a job with the Achaempong government after the doctor finished medical school. (2 R 28). When Joshua Hamidu ascended to power under Dr. Limann, Hamidu interceded to upgrade Dr. Abudu's personnel classification to an "actively try to recruit" classification. Ghana's former Minister of State Mr. Kante and Dr. Abudu both believe that the Rawlings government has those prior government records that show Dr. Abudu's personal alliance with the deposed regimes. (2 R 29, 33).

After his second coup in 1981, Flt. Lt. Rawlings began a systematic campaign of persecution of the former associates of the regimes he had deposed. Mr. Kante stated in his sworn affidavit in support of Dr. Abudu's Motion to Reopen that it is a matter of common knowledge in Ghana that all persons of trust in the two regimes Rawlings ousted are targeted by Rawlings for jail or death. (2 R 32).

Lt. Col. Hamidu was branded Rawlings' Number One Enemy, because Hamidu had publicly criticized Rawlings, both before and after the 1981 coup. President Rawlings offered a reward for Hamidu's arrest and delivery, dead or alive. Lt. Col. Hamidu is in hiding abroad. Rawlings considers Hamidu the leader of the effort to marshal funds and forces from abroad to oust him. (2 R 27, 37-39).

Ph.D. Abudu's home was surrounded by troops, and he rarely left the house for the three months that the Rawlings government lasted after the first coup in 1979. After the

second coup, Ph.D. Abudu got out of Ghana and has been in hiding ever since. (2 R. 26, 36). Ph.D. Abudu did not come out of hiding to give his brother an affidavit for inclusion with his asylum request.

Dr. Badgie went into exile in London and is a major supporter of the Ghana Democratic Movement, an organization strongly opposed to Rawlings' continued rule. Rawlings considers Dr. Badgie a primary member of the exiles' conspiracy to oust Rawlings. (2 R 26, 36, 37).

Mr. Kante was imprisoned for a year following Rawlings' 1981 coup. Mr. Kante did get out of Ghana and was admitted to the United States as a refugee. (2 R 26, 34, 35).

Those events that triggered Dr. Abudu's fear of persecution occurred during his deportation proceedings or shortly after those proceedings ended in June of 1982. During the proceedings, Dr. Abudu expressed his fear, but declined to apply for asylum. After the final Order of Deportation was entered, further events occurred.

First, in June of 1983, two coup attempts were launched against Rawlings. Rawlings charges that these coup attempts were led by exiled dissidents from abroad. (2 R 51). This was the first objective evidence that Rawlings was threatened by exiled dissidents.

It was against this background that, in 1984, Dr. Abudu received his caller from the Rawlings government. Mr. Abukari Alhassan was a prior acquaintance of Dr. Abudu. His call was, however, unsolicited. Alhassan continually steered the conversation towards politics in Ghana. The official tried to pry information from the doctor about the whereabouts and circumstances of the exiles, Hamidu, Badgie, Ph.D. Abudu, and Kante. Further, Alhassan tried to entice Dr. Abudu into returning to Ghana by meeting each of Dr. Abudu's objections with a pat solution. The

official went so far as offer the doctor a military plane to fly wherever he wanted to go. (2 R 29, 30).

Dr. Abudu interpreted these offers as motivated by political, not social, concerns, and as offers made by the government, not by Alhassan personally. He concluded that the only reason Rawlings wanted him to return to Ghana was to force Dr. Abudu through imprisonment and torture to betray his brother and friends by revealing their whereabouts, so that the government could quell the purported conspiracy. (2 R 30, 31).

Dr. Abudu did not, of course, accept any of the Rawlings' man's offers and has continued to stay out of Ghana. He believes that the Rawlings regime has now doubtlessly listed him as a member of the conspiracy of exiled dissidents. Dr. Abudu fears that if he returns to Ghana, he will, at best, be tortured and imprisoned to get him to reveal where the hidden exiles can be found, and at worst, the Rawlings government will consider him as an advance man for a coup and kill him promptly upon his arrival. (2 R 30-31).

The Motion to Reopen was supported by Dr. Abudu's and Mr. Kante's affidavits, and by independent evidence of Rawlings' fear of exiled dissidents, as well as independent evidence that the Rawlings government has the ability and the propensity to carry out a threat, such as the perceived threat from the Ghanaian government official. (1983 Country Reports on Human Rights Practices, Joint Committee Report, 98th Congress, 2d Session; Amnesty International Reports for 1980, 1982 and 1983, Amnesty International, July, 1984 Special Briefing Report on the Public Tribunals in Ghana). (2 R 41-81). Independent evidence of Ghanaian exiled dissidents' activities was also submitted, literature from the Ghana Democratic Movement (2 R 82-98).

The 1984 visit from the Rawlings government official is the fact upon which this case revolves. The BIA chose to view it as benign. The Ninth Circuit Panel said the visit could be benign, but it could, likewise, be threatening. That Court found that the BIA acted contrary to the law when it viewed the fact as benign, because it should have been viewed in the manner most favorable to the alien [in favor of an evidentiary hearing].

SUMMARY OF ARGUMENT

What the BIA decided here was the sole question of whether Dr. Abudu's Motion to Reopen showed a prima facie case of a well-founded fear of persecution, that is, whether he was statutorily eligible to apply for a discretionary grant of asylum. The Board never reached the question of whether discretion should be exercised in Dr. Abudu's favor.

What the Ninth Circuit Panel examined was whether the BIA abused its discretion in resolving that question by action that is not in accordance with the law. 5 U.S.C § 706(A)(2). The reviewing panel examined, not the results, but the processes used by the BIA in applying the prima facie case test to Dr. Abudu's Motion to Reopen. This was a question of law, and the Court is authorized by 5 U.S.C. § 706(A) and a well-settled body of case law to decide questions of law. For that reason, the scope of review was correct.

We respectfully advance that the first major problem that has to be resolved to reach the questions presented in this case is: what level of proof is needed to meet the prima facie case test? We look to that term as it is used in civil proceedings, and our analysis reveals that in the various civil contexts (summary judgment, directed verdict, demurrer), a prima facie case is a case that should go to the

trier of fact, and cases should go to the trier if there is a meaningful task for the trier to perform and there is a meaningful purpose to be served by an evidentiary hearing. The most important task for the trier is to resolve doubts. Hence, when viewed at this level, where cases are screened to determine if they should go to the trier, doubts are resolved in favor of granting an evidentiary hearing (here, the alien). This is what the Ninth Circuit Panel held.

If the BIA was exercising its discretion in denying the Motion to Reopen, it failed to address any discretionary factors. It likewise failed to consider weighty policy considerations that favor establishing a minimum threshold level of proof: legislative concerns in our refugee laws; a statutory mandate for an application procedure; the inherently-included intent to provide an opportunity for a fair hearing, coupled with the difficulty of obtaining proof to support an asylum claim; and the high stakes of risk to life and limb involved in an asylum claim.

In sum, it is our position that what Dr. Abudu had to show was: sufficient evidence to establish that if the Immigration Judge found the evidence to be credible, the Judge could reasonably find that Dr. Abudu had a well-founded fear of persecution. Instead of measuring the evidence as it should have, the BIA weighed the evidence without the benefit of credibility determinations and without the assistance of the regulatorily-mandated State Department advisory opinion. We urge that this was the incorrect legal standard, and the Ninth Circuit was correct when it reversed and remanded the case.

The evidence Dr. Abudu presented establishes that he has a political opinion contrary to that of the leaders of his home country and that he took a stand on that opinion when he rebuffed the Ghanaian government official and his offers. Based upon Dr. Abudu's close relationships with exiled dissidents wanted by the Rawlings government,

combined with that government's well-documented history of persecuting its dissenters, Dr. Abudu's fear for his life if he returns to Ghana is well-founded.

The factual doubt in this case is only as to the motivation of the government official. That question may never be definitively resolved. It does not have to be unequivocally decided to determine if Dr. Abudu's fear is well-founded. It would, however, probably have to be resolved to determine if there is a clear probability that he will be persecuted. That is the standard for withholding of deportation. This Court has decided that the clear probability standard is not the standard to be applied to determine the well-founded fear aspect of a discretionary grant of asylum. *INS v. Cardoza-Fonseca*, 480 U.S. ___ ; 107 S. Ct. 1207 (1987), (hereafter "*Cardoza-Fonseca*"). We believe that what the BIA actually did here was to apply the clear probability test to determine whether Dr. Abudu had established a well-founded fear. That was error.

ARGUMENT

I. THE CIRCUIT COURT PANEL APPLIED THE CORRECT STANDARD OF REVIEW AND SCOPE OF REVIEW.

A. The Standard of Review.

Review of agency action is provided by the Administrative Procedure Act. The Act delineates the reviewing functions of the Courts. It assigns the Courts to decide the questions of law and mandates that the Courts shall set aside action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(A), § 706(A)(2).

In cases that involved motions to reopen to apply for suspension of deportation, this Court has held that the standard of review is the abuse of discretion standard. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981); *INS v. Phinpathya*, 464 U.S. 183 (1984); *INS v. Rios-Pineda*, 471 U.S. 444 (1985). The Service relies heavily on these three cases.

The *Wang* case dealt with the statutory construction of the term "extreme hardship" as one prong of the test for statutory eligibility to apply for a discretionary grant of suspension of deportation. That statute specifies if "in the opinion of the Attorney General . . .", deportation would result in extreme hardship. 8 U.S.C. § 1254(a)(1), (§ 244 I&N Act). The Court held that the statute grants to the Attorney General and his delegates the discretion to define the "extreme hardship" element of statutory eligibility, and held that the Court must defer to the BIA's construction and application of the extreme hardship standard. To the extent the *Wang* case's holding relies upon Congress' grant of discretion to the Attorney General to define statutory eligibility, the case is inapposite here. The case now before this Court is a Motion to Reopen to apply for asylum. Congress did not give the Attorney General discretion to define any element of statutory eligibility to make that application.[2]

The *Phinpathya* case was another suspension case. In a footnote, 464 U.S. 183, 188 n.6, the Court noted the BIA's discretion to grant or deny motions to reopen, citing *Jong*

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[2] As this Court noted in *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1218-19, n.27, on a number of occasions during the decade of legislative proposal for refugee law reform, the government proposed that the standard be a "well-founded fear in the opinion of the Attorney General." What the government sought, but Congress did not give, was the same terminology as stated in the Suspension of Deportation law. *See INS v. Phinpathya*, 464 U.S. 183.

Ha Wang, 450 U.S. 139. But what the Court decided in *Phinpathya* was the meaning of "physical presence in the United States . . . ." 464 U.S. 183. While the *Phinpathya* case may support the abuse of discretion standard, it is to be remembered that it was a reiteration, without examination, of the *Wang* case, a case that had pivoted upon a statutory grant of eligibility.

When certiorari was requested in *Rios-Pineda* it was granted, "[B]ecause this case involves important issues bearing on the scope of the Attorney General's discretion in acting on motions to reopen civil requests for suspension of deportation". 471 U.S. 444, 473. In *Rios-Pineda*, the BIA had discussed and relied upon the alien's prior conduct as negative factors and had in fact exercised its discretion. This Court restated that the standard of review was abuse of discretion and found that there the BIA had not abused its discretion.

Asylum is a two-step process: 1. eligibility; and 2. a discretionary grant. First, the would-be asylee must establish that he or she comes within the statutory definition of a refugee, *i.e.*, that he or she is outside his or her home country and is unable or unwilling to return because of "persecution or a well-founded fear of persecution on account of . . . or political opinion. . . ." 8 U.S.C. 1101(a)(42)(A). One may be considered for a discretionary grant of asylum after he or she establishes that eligibility. 8 U.S.C. 1158(a). In other words, discretion is not involved in an asylum application until after eligibility is established. This differs sharply from the suspension of deportation relief, where Congress granted the Attorney General discretion to define the eligibility. Stated otherwise, where suspension of deportation is discretionary nearly all of the way, asylum is only discretionary in the last lap of the quest.

In view of these sharp distinctions between the earlier cases before this Court on motions to reopen and this case, there may be some legitimate doubt as to whether the *Rios-Pineda* holding on the standard of review on motions to reopen is so all-encompassing as to support the proposition that no motion to reopen deportation proceedings may ever be reviewed under anything but an abuse of discretion standard. Neither Dr. Abudu nor the reviewing Court questioned the standard of review in this case. The reviewing panel cited and acted upon the principle that if an agency made a ruling not in accordance with the law, it has abused its discretion, citing *Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986). 802 F.2d 1096, 1100.

When the Ninth Circuit Panel examined the BIA ruling here, it first reviewed to determine the extent of the BIA's exercise of discretion. It found none. Thus, it set the depth of its review by reliance upon the teachings of *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974), that an agency's order must be upheld if at all on the same basis articulated in the order by the agency itself, 802 F.2d 1096, 1100. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), [the first Chenery rule]. As a Second Circuit Panel stated, where an agency must state a reason, there is an implicit corollary that the decision must stand or fall on the basis of the reason stated, *United States v. Laird*, 469 F.2d 773, 780 (2d Cir. 1972).

The procedure on reopening to apply for asylum is provided by 8 C.F.R. § 208.11. The evidence offered must be material and be evidence that was not available and could not be discovered at the former hearing, or the motion must be based upon facts that occurred after the former hearing was concluded. 8 C.F.R. § 3.2. An additional requirement that an alien must provide a prima facie case of eligibility for the relief requested was added without citation to authority or explanation in 1972 in two cases, *In re Sipus*, 14 I&N, Dec. 229, and *In re Lam*, 14 I&N, Dec. 98.

These rules of law restricted the Ninth Circuit's review to a determination of whether the BIA acted in accordance with the law when it found that Dr. Abudu had not established a prima facie case of eligibility to apply for a discretionary grant of asylum.

B. The Scope of Review

It is well-settled law that the Courts decide questions of law, and the trier of fact decides questions of fact. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481 (1937); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *Commissioner v. Duberstein*, 363 U.S. 278 (1960); *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106 (9th Cir. 1976). As Professor Davis notes in his treatise on *Administrative Law*, Section 706 of the Administrative Procedure Act is basically a codification of law created by courts. Kenneth Culp Davis, *Administrative Law Treatise* 5 2 Ed. 29:1 p.332.

Like most rules, this one is easily stated but not so easily applied. At each end of the spectrum the cases are clear. Often, however, the line of demarcation quickly becomes blurred. *See Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123 (5th Cir. 1978), (determining whether the case should have a full evidentiary hearing).

For purposes of reopening, the facts the alien states in his or her affidavit, unless inherently unbelievable, must be accepted as true facts. *Maroufi v. INS*, 772 F.2d 597, 600 (9th Cir. 1985); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985); *De La Luz v. INS*, 713 F.2d 545 (9th Cir. 1983); *Reyes v. INS*, 673 F.2d 1087 (9th Cir. 1982). The Service relies upon lower court holdings that the reviewing courts are to apply

a deferential standard of review when reviewing BIA decisions on asylum applications. (Pet. Br. 18). Those cases are where an evidentiary hearing has been held, and the question is whether the Board abused its discretion in interpreting the facts and weighing the evidence. The Service's position seems to be that the BIA has the same broad discretion to weigh the facts in a motion to reopen.

In assuming its position in this case, the Service has, we believe, skipped a step. Before the Board could interpret the facts, it must be decided whether they needed to interpret the facts to examine the case for a prima facie case; and if they should interpret the facts, in what manner should they approach that task? Stated otherwise, what process should be followed, what legal standard should be applied to determine the threshold level of proof required to meet the prima facie test. This is a question of law, and the reviewing panel appropriately referred to the scope of review for issues of law. [Levin, *Scope of Review Doctrine Restated: an Administrative Law Section Report*, 38 Adm. Law Rev. 239, 268 (1986)]. 802 F.2d 1096, 1011. (*See* Pet. Br. 32, n.25). If the administrative decision was based upon an erroneous legal standard, it must be reversed. *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969); *McGrath v. Kristensen*, 340 U.S. 162, 224 (1950).

We urge that the question of law that the Circuit Court reviewed in this case was:

> Did the BIA use the correct legal standard to determine the threshold level of proof required to meet the prima facie test, when an alien seeks to reopen deportation proceedings to apply for asylum?

The Court was not only required to review this question, but it was required to decide the question. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481 (1937); *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

II. THE BIA ABUSED ITS DISCRETION IN DECIDING WHETHER TO REOPEN THE PROCEEDINGS.

A. The BIA Applied the Incorrect Legal Standard for the Prima Facie Case Test.

The prima facie case test is not a part of the procedural rules for processing motions to reopen. 8 C.F.R. § 208.11, 8 C.F.R. § 3.2. (The motion must be based upon material evidence, either previously unavailable and undiscoverable, or that is new.) Hence, the Circuit Court was not bound by the strictures on court review of agency ~~rummaging~~ rulemaking. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519 (1978), (Appeals Court improperly reviewed procedural requirement under rule-making powers of APA.) When the BIA added this requirement in 1972, *In re Lam*, 14 I&N Dec. 98, *In re Sipus*, 14 I&N Dec. 229, the Board certainly was not coining a term unique to immigration-related matters.

Black's *Law Dictionary*, 5th Ed., describes the usage of the term as:

> 1. In the sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favor of the allegation he asserts. This means plaintiff's evidence is sufficient to allow his case to go to the jury; and, 2. Courts use "prima facie" cases to mean not only that plaintiff's evidence will reasonably allow the conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it.

The first usage of the term describes the motion for a directed verdict standard, and the latter usage is the standard for a motion for summary judgment. However, the function of the prima facie case test and the effect achieved through the application of the test are the same for each of these proceedings: to screen out cases that should not consume judicial resources by going to the trier of fact.

It is textbook law that the summary judgment procedure serves to screen out those cases that have no issues of material fact to go to the trier of fact, and thus can be resolved by an application of law to the fact. Louisell, *Pleading and Procedure, State and Federal*, 4th Ed., 796-98 (hereafter, "Louisell").

The prima facie case test serves that same function in determining if a case can withstand a motion for directed verdict, *i.e.*, to screen out those cases that should not go to the trier of fact. In that procedure, the case is examined under the "reasonableness" standard: "Could reasonable persons reach different conclusions on the evidence as presented?" 1 *Childress & Davis*, § 3.1 at 155-156 (whether the evidentiary basis is sufficient to support the verdict is most often tested in the Federal courts by a reasonableness measure and all Circuits display cases applying such a test.) If reasonable persons could reach different conclusions, the prima facie case test has been met, and the case will go to the trier of fact.

The rules on the threshold level of proof needed to meet the prima facie case test in these civil contexts are stated differently, and volumes have been devoted to examination of the finer points of these rules. However, in each instance, one of the parties is trying to take the case away from the trier of fact, and the effect of the application of the prima facie case test is to determine which cases should go to the trier of fact. Thus, when the procedures are stripped down to their bones and the function and effect are examined,

they reveal that the threshold level of proof required to meet the prima facie case test in each procedure is that level of evidence that establishes that the case should go to the trier of fact.

These were the functions and effects of the "prima facie case test" when the BIA adopted the requirement. The prima facie case test serves the same function in reopening proceedings. As the Service points out in its Brief (Pet. Br., 40), the Motion to Reopen serves the function of enabling the BIA to identify cases having genuine merit, citing *Jong Ha Wang*, 450 U.S. 139, 145 (1981). The District of Columbia Circuit Court noted this function in *Haftlang v. INS*, 790 F.2d 140 (D.C. Cir. 1986), reflecting that the prima facie case test "serves as a screening function . . . . to isolate cases worthy of further consideration . . . ." 790 F.2d 140, 143.

Because the BIA adopted a requirement with a general meaning in the law without further refining the term's application in an immigration-related context, the Circuit Court Panel certainly acted properly in this case when it looked to that general body of the law, when it attempted to clarify and refine the term for its usage in the specific context of motions to reopen deportation proceedings. In determining the correct process to be applied in the reopening procedures, the Circuit Court noted that these procedures could be analogized to summary judgment proceedings, because, "in both cases, inferences are to be drawn in favor of the party whose entitlement to further proceedings is at stake . . .". 802 F.2d 1096, 1101.

The Circuit Court Panel here referred to summary judgment,[3] but a reference to directed verdict proceedings

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[3] This Ninth Circuit Panel's reference to summary judgment is not unique. *In dicta*, a District of Columbia panel referred to the similarities of motions to reopen and motions for summary judgment. *Haftlang v. INS*, 790 F.2d 140, 143.

would have been equally appropriate. That is because, in considering a motion for a directed verdict, a court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. *Christie v. Callahan*, 124 F.2d 825, 827 (D.C. Cir. 1941); Wright & Miller, *Federal Practice & Procedure*, 1979, (hereinafter, "Wright & Miller"), § 2524, 9:544-45.

It seems that the Service has misread the import of the Circuit Panel's analogy. The Ninth Circuit did not state a rule of law that motions to reopen are governed by the procedure for summary judgment. What it did was look to those proceedings as a part of the general body of law for a guidepost as the Panel attempted to clarify and refine the prima facie case test as a concept of law.[4]

Much could be said to argue one set of guideposts over another. We could advance the directed verdict guidepost as preferable to the summary judgment guidepost, or vice versa. Similarly, reference could be made to the procedures for a general demurrer,[5] the question being whether the matters alleged in the motion to reopen, assumed *arguendo* to be admitted, states propositions of fact which if proved would entitle the movant to the relief sought, where again, the facts are viewed most favorably to the grant of an evidentiary hearing. Louisell, 9:736-37. Much has been said by the Service as it urges a wooden application of a position of the party test, moving party versus non-moving party, with no analysis of the purposes served by the test (Pet. Br.,

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[4] That the word "analogy" means "partial likenesses between two things compared" — Oxford American Dictionary, 1980 — supports this proposition.

[5] In Federal Court, this is a motion to dismiss for failure to state a claim upon which relief can be granted. F.R.C.P. 12(b).

34), or even criminal proceedings with a disclaimer that deportation proceedings are not criminal in nature (Pet. Br. 28-29).[6]

We urge that none of this is necessary because the common core in all civil proceedings that use the prima facie case test is that the test serves as a screening function to isolate cases worthy of further consideration by the trier of fact. The partial likenesses are: in order to fulfill that screening function, ambiguous facts are to be viewed in favor of the case going to the trier of fact. [Summary Judgment, *United States v. Diebold*, 369 U.S. 654, 655 (1962); Motion for Directed Verdict, *Christie*, 124 F.2d at 827; Wright & Miller, § 2524, 9:544-45.] The question actually becomes whether there is a meaningful task to be performed by the trier of fact and there is a meaningful purpose to be served by an evidentiary hearing. In *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978), because the judge hearing the motion on summary judgment was also the trier of fact, and an evidentiary hearing would not aid in reaching a determination, trial was not required. Likewise, in a Motion to Reopen deportation proceedings to apply for discretionary relief, if the BIA exercises its discretion and determines that the relief should not be granted, it need not reopen the case. *INS v. Bagamasbad*, 429 U.S. 24 (1976).

The prior cases on motions to reopen civil deportation proceedings have stated the prima facie case test as requiring evidentiary materials which, if believed, could

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[6] The analogy to criminal proceedings goes awry when close examination reveals that the Service is talking about reopening a criminal proceeding to try the issue of guilt/innocence. Motions to reopen are not generally to retry the issue of deportability; they are to seek affirmative relief from that Order. Relief from the effect of a finding of conviction, such as motions to modify a sentence, terminate probation or restore civil rights after conviction are not governed by the principles cited by the Service. *Also see* Brief Amicus Curiae, AILA.

satisfy the requirements for substantive relief. *Reyes v. INS*, 673 F.2d 1087, 1089-90 (9th Cir. 1982). The Board is to assume the facts to be true unless inherently unbelievable. *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985). Because the motion is a preliminary proceeding and is not intended as a substitute for a hearing, *Reyes v. INS*, 673 F.2d 1087, 1089 (9th Cir. 1982), the Board's function is to determine whether the alien has set forth a prima facie case; it is not to determine if the alien is eligible for the relief sought. *Saldana v. INS*, 762 F.2d 824, 826 (9th Cir. 1985).

In an asylum application, credibility is often the crucial factor upon which the case turns. *E.g., Zavala-Bonilla v. INS*, 730 F.2d 562, 566 (9th Cir. 1984). It is the Immigration Judge who is in the best position to evaluate an alien's testimony. *Estrada v. INS*, 775 F.2d 1018 (9th Cir. 1985), [citing *Phinpathya v. INS*, 673 F.2d 1013, 1019 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 183 (1984)]. In the case at bench, the Service in its Brief dramatizes the need for an evidentiary hearing. The Service cites outside materials relating to the availability of physicians in Ghana (Pet. Br., 38-39, n.30, 31). Because new material cannot be offered at the appellate level, this material must be viewed as offered for a proper purpose, that is, an example of credibility issues. At first blush, these materials cast doubt upon the credibility of Dr. Abudu's assertion that there is no real shortage of doctors in Ghana. At an evidentiary hearing, there would be further probing. For example: is medical care in Ghana provided by the public or the private sector? Is it Ghana's austere economic policy (2 R 58) that imports these facts? Does Ghana's gasoline shortage (2 R. 30) impact Ghanaian physicians in its cities? Do Ghana's native Africans shun modern medicine as we Westerners know it, opting for traditional tribal doctors?

At this point, we neither know nor need to know the answers to these questions. The questions coupled with their

answers are a part of the weighing of the evidence process that is to be done in an evidentiary hearing. The question posed by the government underscores that there is a meaningful task to be performed by the Immigration Judge as trier of fact in this case. Hence, the BIA abused its discretion when it did not reopen the case.

That all the Attorney General intended for the BIA to do upon motion for reopening was to measure the evidence for sufficiency is shown by the regulatory requirement that in every application for asylum, an advisory opinion from the Department of State's Bureau of Human Rights & Humanitarian Affairs (BHRHA) be obtained by the Immigration Judge (or District Director, whichever is appropriate) and be made a part of the record. 8 C.F.R 208.7, 208.10(b). By making this requirement, the Attorney General has partially deferred to the expertise of the Department of State in determining the impact of conditions in a would-be asylee's home country, when weighing the applicant's evidence in an application for asylum. When the BIA not only measures the evidence for sufficiency but also weighs the evidence, it cuts off any benefit that flows from this designated source of expertise.

When the teachings of the prima facie case test are examined, we find that the test's function and purpose is to determine if the case should go to the trier of fact. When the test is thus applied to a motion to reopen to apply for asylum, the result is that if there is a meaningful task to be done by the trier, such as credibility determinations and consideration of State Department advisory opinion, the facts must be viewed in a manner most favorable to the granting of an evidentiary hearing.

That is the rule of law stated by the Circuit Court, a rule not followed by the BIA. Hence, the procedure the BIA used was incorrect. That the result was incorrect logically flowed from an application of an incorrect process.

B. The BIA Failed to Consider Important Factors in Establishing the Proper Threshold Level of Proof.

It is an abuse of discretion for the BIA to make discretionary determinations that conflict with the Legislative concerns that underlie the statute. *See, e.g., Israel v. INS*, 785 F.2d 738, 740 (9th Cir. 1986), (in request for adjustment of status based upon marriage to a United States citizen, discretionary grants are favored in the interest of family unity). In a request for extraordinary relief of suspension of deportation, a broader range of discretionary authority is granted to the BIA. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). When the BIA's discretionary denials are inconsistent with Legislative intent and not grounded in legitimate concerns about the administration of the immigration laws, these denials will be reversed by the reviewing court. *Gonzalez-Batoon v. INS*, 791 F.2d 681, 686 (9th Cir. 1986); *Aviles-Torres v. INS*, 790 F.2d 1433, 1437 (9th Cir. 1986); *see also INS v. Rios-Pineda*, 471 U.S. 444 (1985), (upholding a discretionary denial that was grounded in legitimate concern about the administration of the immigration laws).

Those legitimate concerns are important factors that should have been considered by the BIA as it determined the threshold level of proof required to meet the prima facie case test. This is because any administrative agency is required, as it exercises its discretion, to consider all factors, and agency action will be set aside for failure to consider such factors. *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1422 (9th Cir. 1987); *Portland Cement Assoc. v. Ruckleshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

To the extent that the BIA's denial in this case was within its discretionary powers, that discretion must be constrained

by our American concern for refugees, shaped by the long history of United States commitment to refugees and culminated in the Refugee Act of 1980. Congress' intent in creating asylum relief is readily apparent from the legislative history relating to the Refugee Act of 1980. That Act developed from our "special national heritage of concern for the uprooted and the persecuted". *Hearings on H.R. 3056 Before the Subcomm. on Immigration Citizenship & International Law of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 16 (1977). *See also Cardoza-Fonseca*, 107 S. Ct. 1207, 1215.

When Congress enacted the 1980 Refugee Act it explicitly commanded that the Attorney General establish a procedure to apply for asylum. 8 U.S.C. 1158(a). This Court has not spoken on the issue, but lower courts have recognized a due process of law right to apply for asylum (to be distinguished from right to receive asylum) before the conclusion of deportation proceedings. *Jean v. Nelson*, 711 F.2d 1455, 1507 (11th Cir. 1983), *rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *aff'd*, 105 S. Ct. 2992; *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1038-39 (5th Cir. Unit B, 1982), [*modifying* 503 F. Supp. 442 (S.D. Fla. 1981)]; *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 375 (C.D. Cal. 1982); *Nunez v. Boldin*, 537 F. Supp. 578, 584 (S.D. Tex. 1982). That issue was not addressed to the court below, and it need not be decided here;[7] because, at the very least, when Congress mandated a procedure it evidenced an intent to afford an opportunity for aliens to apply for asylum that weighs heavily in favor of requiring only a minimum threshold level of evidence to meet the prima facie case test.

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[7] See *Jean v. Nelson* [*Jean III*], 105 S. Ct. 2992, 2997-99. (The *Jean II* court should have decided the case on statutory or regulatory grounds to avoid Constitutional adjudication.)

The Attorney General set up a procedure to apply to the local INS District Director or to the Immigration Judge, and to request that deportation proceedings be reopened to apply. When the claim is not asserted until after the conclusion of deportation proceedings, the heavy interest in the opportunity to apply has to be balanced with BIA's interest in preventing lengthy delays of deportation and the orderly administration of immigration laws. *INS v. Rios-Pineda*, 471 U.S. 444 (1985). That interest is a legitimate one, but the Attorney General protected it by the requirements that the motion should be based on material evidence previously unknown and unascertainable or that is new. 8 C.F.R. § 3.2.

Further strenuous requirements are not necessary to protect the interests of orderly administration of our immigration law, particularly when we consider that the passage of time alone does not make for eligibility for asylum as it does in suspension. Rarely does the alien have any control whatsoever over the events that create the well-founded fear. Here, Dr. Abudu did not contribute to President Rawlings' display of tyranny in Ghana. Dr. Abudu did not incite the aborted coups in Ghana. He certainly did not wish upon himself the ominous visit from the Rawlings government man.

Congress' mandate of an opportunity to apply for asylum implies an opportunity for a fair hearing. That interest, likewise, weighs heavily in favor of a minimum threshold level of evidence for the prima facie case test. *The Office of the United Nations High Commissioner for Refugees, Handbook on Procedures & Criteria for Determining Refugee Status* (Geneva, 1979) ("*Handbook*"), widely recognized as a strong guide, not necessarily with the force of law, in the application of the refugee law (*Cardoza-Fonseca*, 107 S. Ct. at 1217) teaches that doubts should be

resolved in favor of an alien in proving his case for refugee status. *Handbook*, § 196, at 47.

Unlike, for instance, the applicant for suspension of deportation, the would-be asylee must depend upon evidence that must come from a country thousands of miles distant. That evidence almost always relates to incidents of tyranny and threats that the alien's home country's government would prefer to suppress. Often the evidence needed would be coming from persons who are in fear for their own life, a person such as Dr. Abudu's brother, who was criticized by the BIA for not revealing his whereabouts long enough to give an affidavit to support Dr. Abudu's claim that he would be persecuted to get him to reveal that exiled brother's whereabouts. (Pet. App. 9a).

The trend of the law is to recognize the difficulty of proof as an important factor in an asylum claim. That factor has led to some courts' dispensing with the requirement that a would-be asylee corroborate the facts upon which his or her claim is based. *Zavala-Bonilla v. INS*, 730 F.2d 562, 565 (9th Cir. 1984) ("The applicant could hardly ask authorities in El Salvador to certify that she would be persecuted, should she return."), *see Bolanos-Hernandez*, 767 F.2d 1277, 1285 (9th Cir. 1985) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."), *see also, Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984), (sometimes the applicant has only his own testimony to show persecution). The difficulty of proof is a factor that weighs heavily in favor of establishing a lower threshold level of proof to meet the prima facie case test. It was neither addressed nor considered by the BIA.

Another significant factor that was overlooked by the BIA when it set its proof requirements for the prima facie case test is the high stake involved in granting or denying a would-be asylee access to the Court. Unlike the applicant

for adjustment of status, the asylum applicant is not merely faced with inconvenience of traveling to his or her home country to obtain immigration papers, *Fazelihokmabad v. INS*, 794 F.2d 1470 (9th Cir. 1986), *pet. for cert. pending*, nor is the applicant inconvenienced by having to apply for permission to reenter after deportation when voluntary departure is denied. What is at stake in requesting permission to reopen to apply for asylum is the possibility of persecution. It is often the alien's life that could be on the line. *See Cardoza-Fonseca*, 480 U.S. __ , 107 S. Ct. 1207, 1222 (1987), (noting the seriousness of the consequences). Certainly, the possibility that death awaits in one's home country should tip the scales in favor of resolving doubts in the manner most favorable to giving a would-be asylee access to the Immigration Court.

When these strong factors are viewed and weighed against the interests of an orderly administration of our immigration laws, the scales, we believe, plummet on the side in favor of viewing the evidence in the light most favorable to the grant of an evidentiary hearing. When the BIA, as it did here, requires the would-be asylee to prove his entire claim of statutory eligibility, part and parcel, in the preliminary screening proceedings of a motion to reopen, the Board abuses its discretion.

C. Dr. Abudu Had Adequately Explained His Failure to Apply for Asylum at an Earlier Time.

When Dr. Abudu first stood before an Immigration Judge, he expressed his fear of returning to Ghana (1 CR 45). That was before President Rawlings had actually retaken the government. However, before the proceedings had concluded, Rawlings' return to power had come to fruition (2 R 26). Dr. Abudu's position then was that of a

distant, silent dissenter, related to and associated with officials in prior governments that had been ousted by Rawlings (2 R 26, 27). It was another year before Dr. Abudu's brother and friends became suspects in a purported coup conspiracy (2 R 51), and it was another two years before Dr. Abudu himself was placed in a position that required him to take a political stand (2 R 29, 30, 31). When Dr. Abudu first expressed fear, his case consisted of little more than a mere assertion of fear, which is simply not enough. *Shoaee v. INS*, 704 F.2d 1079 (9th Cir. 1983). Under the state of the law as it existed at that time, Dr. Abudu's fear was genuine, but there is serious doubt whether it was well-founded. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1215. *Also see* Brief, Amicus Curiae, Lawyer's Committee for Human Rights, pp. 18-27. It was the 1984 visit from the Rawlings official that required Dr. Abudu to take a political stand, and it was that visit that made his fear well-founded. This is a new fact within the meaning of 8 C.F.R. § 208.11.

III. DR. ABUDU'S MOTION MET THE THRESHOLD LEVEL OF PROOF FOR THE PRIMA FACIE CASE TEST OF A WELL-FOUNDED FEAR OF PERSECUTION.

On March 9, 1987, this Court held that the standard for determining a "well-founded fear" (of persecution) is not identical to the "clear probability" standard for determining whether deportation should be withheld. *Cardoza-Fonseca*, 107 S. Ct. 1207.

In *Cardoza-Fonseca*, this Court left the development of the concrete meaning of the term to a process of case-by-case adjudication. To some extent that process actually began prior to *Cardoza-Fonseca* in the Circuits that had

decided cases in accordance with the view, especially the Ninth Circuit from whence *Cardoza-Fonseca* emanated.

All corners of the definition of a refugee, 8. U.S.C. 1101(a)(42)(A) must be viewed, however, briefly, in order to show that Dr. Abudu met his burden for the prima facie case test. He is clearly a person outside his country of nationality. Dr. Abudu has unequivocally asserted his unwillingness to return. That unwillingness is based upon a claim of a well-founded fear of persecution on account of political opinion.

Let us examine the last aspect of the test first — political opinion.

Dr. Abudu has never been a formal member of any of Ghana's varied regimes. He has affiliated himself with the regimes through the closest ties one can have, the ties of family, lifelong quasi-family relationships and friendships. He aligned himself ideologically with both of the regimes President Rawlings ousted, the Achaempong and Limann governments, through his consideration of government appointments offered first by Achaempong's Minister of Health and reiterated by the Limann government through his friend, Lt. Col. Hamidu. This information is believed to be in Rawlings' hands. (2 R. 33).

Dr. Abudu is strongly opposed to the Rawlings regime and strongly supports the nonviolent return of democracy to Ghana, a fact that Basko Alhassan Kante, a Ghanaian refugee and now a permanent resident of the United States swears to, based upon his personal knowledge. This does constitute a political opinion. The Rawlings government should have learned the fact of Dr. Abudu's personally-held political opinion when he failed to return to Ghana, despite magnanimous offers from the Rawlings government.

Dr. Abudu's political opinion was intensified in the eyes of the Rawlings regime because of his circumstances. He is

not just another Ghanaian who went away to school and doesn't want to come back. He is the brother of one enemy of Ghana and lifelong friend of Ghana's No. One Enemy. Added to these two binding relationships, Dr. Abudu is also closely associated with one refugee from the Rawlings regime and the openly-admitted leader of a London-based anti-Rawlings movement that puts his call for an ouster of Rawlings into print. (2 R 82-98). When the tyrannical Rawlings, who is credited with having Col. Khadaffi as a role model and a fiscal backer (2 R 85, 86), views Dr. Abudu, this is what he sees. These alliances are added to Dr. Abudu's political opinion and political stand, and they grow in Rawlings' mind as the shadow of the late day to become a political threat. In Rawlings' mind, Dr. Abudu may well be a part of that conspiracy he fears will knock him from power, just as Rawlings lowered the knell on the Achaempong and Limann reigns.

After the 1965 Amendment to our refugee laws deleted the requirement that persecution be physical and required that the persecution be on account of certain grounds, including political opinion, the question of what constitutes a political opinion arose in the well-known *Kovac* case. In *Kovac*, the alien's political opinion was gauged not by the alien's political stance, but by the manner his home country viewed his actions. *Kovac v. INS*, 407 F.2d 102, 104-05 (9th Cir. 1969). Despite that early decision, for many years the political opinion prong of the test was generally viewed as requiring an advocacy.

As international conditions have changed from one country pitted against another, and more and more frequently, it is a long-standing battle between internal factions trying to gain control of a country, the view of "political opinion" has begun to change to meet the realities of the world today. This trend is in the Ninth Circuit, where, in 1985, it found active neutrality a political opinion,

Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1985), *modifying* 749 F.2d 1316 (9th Cir. 1984). Then it found a tacit expression of neutrality a political opinion in *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985).

Still later in 1985, the Ninth Circuit rejected altogether the need for political expression or participation, either of advocacy or neutrality, and held that the key factor is not the applicant's acts or views; it is the home country's perception that determines whether the persecution is for a political opinion. That Court found that the alien's actual thoughts or deeds were irrelevant. What matters is what the government believes about his views or loyalties. It is that which determines the reasons for the persecution. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985); *accord, Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

In the case now before the Court, Dr. Abudu believes that the Rawlings-led Ghana government's view of Dr. Abudu's political opinion has enlarged that opinion to a strongly-held opinion that constitutes membership in a conspiracy to overthrow the Rawlings government. If he is not viewed in that light by the Rawlings government, Dr. Abudu fears that he would be imprisoned and tortured by the Ghanian government in order to get him to reveal the whereabouts of the exiled dissidents with whom Dr. Abudu is associated. Dr. Abudu was forced by the Ghana government to take a stand and manifest his political opinion when the government official made inquiries of him that he declined to answer and asked him to go home, an "invitation" he has tacitly declined. Here, the effect of the home country's view of Dr. Abudu's political opinion is merely to intensify the strength of that opinion.

While the Rawlings government may be wrong about the force of Dr. Abudu's political opinion, if Dr. Abudu is killed, whether he is killed because he believed to be a part of a coup or whether he is killed because he refuses to give

information to an interrogator, it would be of little comfort to his United States citizen widow, and of little comfort to our refugee policy that Rawlings was wrong. He would, nevertheless, have been killed for a political opinion. Hence, we urge that Dr. Abudu has satisfied the political opinion strand of the refugee test.

Next, we examine the well-founded fear prong of the test. The Courts that dealt with the question prior to *Cardoza-Fonseca* have referred to some degree of "reasonableness". "[A] reasonable expectation of persecution . . ." has been stated by the Ninth Circuit, *Diaz-Escobar v. INS*, 782 F.2d 1488, 1493 (9th Cir. 1986). The Fifth Circuit and the Second Circuit looked to see if a reasonable person in the same kind of circumstances would fear persecution. *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987); *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986).

In *Cardoza-Fonseca* this Court referred to its earlier comment in *INS v. Stevic*, (hereinafter "*Stevic*"), 467 U.S. 407, 424-25 (1984), that if the evidence establishes an objective situation, it is enough that persecution is a reasonable possibility.

In its first post-*Cardoza-Fonseca* decision, the BIA embraces the "reasonable person" standard of the Fifth Circuit's *Guevara-Flores* case. *In re Mogharrabi*, I.D. 3028, *decided* June 12, 1987].

That reasonable person is, of course, easier to describe than identify. In the case before the bench, we have a man closely related to and associated with four men suspected of plotting to overthrow Dr. Abudu's home country's government, two of whom are in hiding. An official of the threatened government comes to see Dr. Abudu in the United States and asks Dr. Abudu about the suspects and about an organization that openly calls for the threatened government's ouster, and that official offers Dr. Abudu

whatever it is he needs to go back to Ghana. Dr. Abudu interpreted this as a covert action to lure him back to Ghana so that the Rawlings government could use violence to get him to reveal the whereabouts of the two hidden exiles. (2 R 29-31). Was this reasonable?

> First: was it reasonable to believe that the Ghanian government would engage in covert activities? We ask that question at a time when every major country and many nearly unknown countries have been charged with covert actions, regardless of their political ideology?
>
> Second: was it reasonable to impute covert activities to the Rawlings government in this instance? Certainly Rawlings would not have been expected to merely telephone a few people abroad and tell them that he needed information to stop Ghanaians abroad from interfering with his government back home.
>
> Third: was it reasonable to target Dr. Abudu for this covert action? Here was one man who could probably know where to find two of the hidden exiles Rawlings sought, a Ghanian in the United States without legal status, unlike his permanent resident brother, Baba. (2 R 22). Yes, he would be a reasonable target. He could hold the key of knowledge to unfold the details of the operation. He certainly was a likely person to entice back to the country of his citizenship.
>
> Fourth: was it reasonable to believe that Rawlings would send this particular man? Who would be better suited than a man whose government position was too modest to, in and of itself, invoke suspicion, and a man who already knew the targeted person?

What better scenario for a covert operation is the BIA ever likely to see? Covert operations are by definition secretive, and it is common knowledge that the real reason, the motivation, is often that which is secret. Such actions are commonly not what they seem to be. Whether Dr. Abudu was targeted for a covert operation probably never will be determined with certainty. There certainly was a reasonable possibility that Dr. Abudu was being set up to become the Rawlings government's pawn in this game of violence.

The objective evidence presented establishes the circumstances that made Dr. Abudu's subjective fear reasonable:

1. President Rawlings had taken the Ghanian government by violence (2 R 33);
2. President Rawlings has imprisoned and killed members of governments he ousted (2 R 48, 49, 52);
3. President Rawlings held the government by violent resistance to threats to the government (2 R 51); and,
4. Rawlings' reign had been threatened by two coup attempts, alleged by Rawlings to have been led by exiled dissidents from abroad (2 R 51).

These facts did not just show that they could support a finding of a well-founded fear. Unless evidence to the contrary is presented at an evidentiary hearing, or Dr. Abudu's credibility is shaken, Dr. Abudu's facts would establish a well-founded fear. It was not necessary under the well-founded fear test to decide whether this was in fact a covert operation. All that was needed that a reasonable person would be afraid to go home under the circumstances. *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987); *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986).

Had the BIA applied the correct rule of law and found that the prima facie case test had been met, the Board would have had a choice to either go on to determine the

discretionary aspect of the application, *INS v. Rio-Pineda*, 471 U.S. 444 (1985); *INS v. Bagamasbad*, 429 U.S. 24 (1976), or to reopen the case, (*Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986); *see Haftlang v. INS*, 790 F.2d 140, 143 (D.C. Cir. 1986), (alien's facts did not establish statutory eligibility for asylum).] Here, the Board did not weigh all relevant factors, *Jen Hung Ng v. INS*, 804 F.2d 534 (9th Cir. 1986). The Board did not consider the negative and the positive factors and address those factors as it is required to do when exercising discretion.[8] *Gonzalez-Batoon v. INS*, 791 F.2d 681 (9th Cir. 1986); *Fazelihokmabad v. INS*, 794 F.2d 1470 (9th Cir. 1986), *pet. for cert. pending*.

There is simply no support for the proposition that when a prima facie case test has been met, if discretion has not been exercised the BIA may simply decline to reopen the case. *See* Brief, Amicus Curiae, American Immigration Lawyers Assoc. (AILA). The teaching of the prior cases is that the Board must either exercise its discretion or reopen, once a prima facie case has been established.

[8] At no stage of the proceedings involving Dr. Abudu's deportation has anyone ever discussed the discretionary factors as to whether he should be granted any form of discretionary relief. Each time Dr. Abudu asked for discretionary relief, he was denied on the grounds that he was ineligible. (Pet. App. 23a, 24a, and 28a).

IV. THE BIA APPLIED THE WRONG LEGAL STANDARD IN EVALUATING DR. ABUDU'S CLAIM, BECAUSE IT APPLIED THE CLEAR PROBABILITY TEST TO BOTH THE WITHHOLDING CLAIM AND THE ASYLUM CLAIM.

The ambiguity in this case was the underlying motive for the Ghanian government official's visit. As discussed above, Dr. Abudu's fear as a result of that visit was reasonable. Then, why was it necessary to determine the caller's motive? It was not necessary for the well-founded fear test, but it may have been necessary to determine whether Dr. Abudu was eligible for withholding of deportation. When the BIA found it necessary to interpret the motivation of Dr. Abudu's caller, regardless of the test enunciated, what it was doing was examining the facts under the clear probability test: was it more likely than not that Dr. Abudu would be persecuted? For that test, it might well have been necessary to examine the visit to see if it really was ominous.

The application, however, was not just an application for withholding of deportation; it was an application to reopen the proceedings in order to permit Dr. Abudu to apply for asylum under 208(a) I&N Act, 8 U.S.C. 1158 (a).

The instant case was decided before *Cardoza-Fonseca*, and the Service's position at that time was that the tests were "essentially comparable", that the distinctions were not "meaningfully different", and that in practical application, the two standards converge. *In re Acosta*, I.D. 2986, March 1, 1985, [effectively overruled by *Cardoza-Fonseca*]. When it announced its decision here, the BIA did repeat the rule of *Stevic*, 467 U.S. 407, 424-25 (1984), *i.e.*, that a well-founded fear of persecution does not satisfy the requirements for withholding of deportation under 8 U.S.C.

§ 1253(h), (243h I&N Act); thus the two standards are not the same. The Board did not separately analyze the application of the rule by examining both well-founded fear and clear probability. In *Mogharrabi* (I.D. 3028), the BIA enunciated a rule that [in view of *Cardoza-Fonseca*] a clear delineation of the findings on each application is now required. I.D. 3028, 9. In this pre-*Cardoza-Fonseca* case, the Board merely chose its interpretation of the motivation factor involved and announced that under its interpretation the facts did not meet the prima facie case test for a well-founded fear. We urge that the reason the Board believed that it was to decide the question of motivation was because it was in fact, if not in word, treating the two tests as convergent, if not fungible tests.

It was the teaching of *Stevic*, 467 U.S. 407, 424-25, that deportation is to be withheld if the alien's life or freedom "would" be threatened, and withholding is not required if the alien "might" or "could" be persecuted. What the facts here established is that Dr. Abudu's life or freedom could be threatened. If one has to determine whether his life or freedom *would* be threatened, then one does have to first decide if the Ghanaian government caller's visit was ominous. Here, the BIA did only one examination of the facts. It conducted an examination that might well be necessary under the clear probability test. In view of the fact the BIA's position at that time was that the two tests converge and the Government's position upon litigation of *Cardoza-Fonseca* was that the two standards are identical, we believe that the inescapable conclusion is that, while the BIA may have bowed to the words of the *Stevic*, 467 U.S. 407, 424-25, decision and to the words of the Ninth Circuit's precedent decisions, *Bolanos-Hernandez*, 767 F.2d 1277, 1285 (9th Cir. 1985), when it decided this case, it was in fact treating the withholding aspect of the case and the

asylum aspect of the case the same, and it applied only one test, the clear probability test. That was error.

CONCLUSION

Based upon the foregoing, we respectfully urge that this Court affirm the Ninth Circuit Court of Appeal's decision in this case.

Respectfully submitted,

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REPLY

BRIEF

No. 86-1128

In the Supreme Court of the United States

OCTOBER TERM, 1987

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ASSIBI ABUDU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE PETITIONER

The court of appeals held that the Board of Immigration Appeals (BIA) erred in denying respondent's motion to reopen deportation proceedings. The court concluded, contrary to the BIA, that respondent had made out a prima facie case for asylum (Pet. App. 11a). In reaching its decision, the court adopted two rules that must be applied in the context of motions to reopen. First, it held that the BIA's refusal to reopen because of an alien's failure to set out a prima facie case must be reversed by the reviewing court if that decision is not "correct" (*id.* at 7a). Second, it held that the BIA, in ruling on a motion to reopen, must draw all reasonable inferences in favor of the alien (*id.* at 9a-10a).

In our opening brief, we explained (Gov't Br. 17, 22-24) that the court of appeals' decision cannot be

reconciled with various decisions of this Court holding that the BIA's rulings on motions to reopen must be given substantial deference. See *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143-144 n.5 (1981). Specifically, we maintained (Gov't Br. 21, 30-32) that the proper inquiry on review is not whether the BIA's decision is "correct" but simply whether it is reasoned and not arbitrary. We further contended (*id.* at 33-35) that the court's rule that the BIA must draw all reasonable inferences in favor of the alien improperly compels the BIA to grant reopening even in marginal or insubstantial cases. We explained (*id.* at 35-43) that in the present case, the BIA properly denied reopening because it reasonably found that (1) respondent failed to establish a prima facie case for asylum or withholding of deportation and (2) he did not meet the regulatory requirements for reopening (see 8 C.F.R. 208.11) because he did not adequately explain his failure to seek asylum or withholding during the deportation hearing.

1. a. Respondent and the various amici [1] offer no persuasive reason why the BIA should have granted reopening, and they all but ignore several of our principal contentions. Thus, they devote little attention to our argument (Gov't Br. 16, 35-40) that the BIA properly denied reopening on the ground that respondent did not adequately explain his failure to apply for asylum or withholding of deportation during the deportation proceeding, as required by the

[1] Amicus Briefs were filed by the American Immigration Lawyers Association ("AILA"), the Lawyers Committee for Human Rights ("LCHR"), and the Centro Presente, Inc., et al. ("Centro Presente").

regulations.[2] Indeed, respondent persists in erroneously claiming (Resp. Br. 9; Resp. Br. in Opp. Cert. 20) that the "sole question" decided by the BIA was whether respondent established a prima facie case of eligibility for asylum.[3] Moreover, while respondent and one of the amici offer brief explanations for respondent's failure to seek asylum and withholding of deportation during the deportation hearing, those explanations are conflicting and, in any event, are irrelevant since they were not made to the BIA in the motion to reopen.[4]

[2] In our view, since the BIA properly denied relief on that ground, it was not required even to address the question whether respondent established a prima facie case for relief. Cf. *Rios-Pineda*, 471 U.S. at 449; *INS* v. *Bagamasbad*, 429 U.S. 24, 25-26 (1976).

[3] The court of appeals similarly mischaracterized the BIA's opinion; it indicated (Pet. App. 6a) that the "sole issue is whether [respondent] presented a *prima facie* case for reopening."

[4] Respondent indicates (Resp. Br. 28-29) that until the visit from the Ghanian official, he did not have a sufficient basis for seeking asylum. In his motion to reopen (2 R. 17, 29-30), he also emphasized that visit. However, in that motion he did not suggest that his other evidence had previously been inadequate. To the contrary, he contended (2 R. 18-19) that the Immigration Judge (IJ) who presided at the deportation hearing erred in failing to ascertain whether there was a factual basis for a claim of asylum or withholding of deportation.

Amicus AILA offers a different explanation—that respondent's failure to seek relief at the deportation hearing may have stemmed from erroneous legal advice (AILA Br. 18-19). Again, however, no such explanation was offered to the BIA. Even today, respondent himself makes no such claim.

There is likewise no merit in AILA's suggestion (AILA Br. 25-27) that the issue of the BIA's denial of reopening because

The BIA's requirement that an alien seeking reopening to apply for asylum must provide a reasonable explanation of his failure to seek such relief during the deportation hearing serves the obvious function of ensuring that the motion to reopen is not a last-minute dilatory maneuver to avoid deportation. Because the BIA reasonably found that respondent did not comply with that requirement, reopening was properly denied.

b. Respondent maintains (Resp. Br. 29-36) that the court of appeals was correct in holding that his motion to reopen alleged a prima facie case of eligibility for asylum.[5] Nonetheless, his own analysis plainly demonstrates the reasonableness of the BIA's decision that reopening was not appropriate. Thus, respondent concedes (Resp. Br. 28-29) that at the time of the deportation hearing, the facts in his case were insufficient to establish a well-founded fear of persecution. Yet, he also concedes (Resp. Br. in Opp. Cert. 11-12) that his new evidence postdating the deportation proceeding—the visit from the Ghanian

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of respondent's failure to comply with 8 C.F.R. 208.11 is not ripe for review. According to AILA (AILA Br. 25-26), it is unclear whether the BIA would have denied reopening on that ground had it believed that respondent set forth a prima facie case of eligibility for asylum. In fact, however, the BIA made clear (Pet. App. 18a (citing *Jong Ha Wang*)) that respondent's failure to meet the regulatory requirements was a separate and independent basis for denying reopening.

[5] He does not argue that his motion alleged a prima facie case of entitlement to withholding of deportation; thus, he apparently concedes that the BIA properly decided that issue. Even the court of appeals, under a standard drawing all inferences in favor of the alien, stated that it was "not clear" whether respondent made the requisite showing for withholding (Pet. App. 11a).

official—"was ambiguous; it could have been viewed as either benign, or threatening." [6] These concessions, we submit, fatally undermine respondent's claim that the facts alleged in the motion *compelled* reopening for an evidentiary hearing.

2. a. Respondent and amici make little effort to defend the court of appeals' novel and unprecedented rule that the BIA's determination of whether a prima facie case was established is subject to de novo review.[7] Although respondent (Resp. Br. 16) and AILA (AILA Br. 3, 22-23) express agreement with the court of appeals on that point, they cite no relevant authority in support of that position. Nor do they explain why the BIA's assessment of whether a motion to reopen presents a prima facie case should be given no deference whatsoever, particularly since the BIA, in weighing the evidence, is performing a congressionally-assigned task within its expertise. See Gov't Br. 25-26 (citing cases).[8] The court's de novo

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[6] Respondent notes (Resp. Br. 34) that the Ghanian official did not hold a high position in that government. Nonetheless, he speculates that the visitor was sent by Flight Lt. Rawlings, and he states that a low-level official was selected precisely to avoid suspicion. But it is equally plausible, if not more so, that the visitor was not sent by Rawlings but instead was paying a purely social visit to an old friend (see Pet. App. 17a).

[7] Indeed, amici Centro Presente state (Centro Presente Br. 12 n.5 (emphasis added)) that they "do *not* argue or imply that the court should substitute its weighing of the evidence and findings of the significance of newly presented evidence for that of the Board."

[8] See also *Rios-Pineda*, 471 U.S. at 452 (citations omitted) ("In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appel-

review standard is particularly inappropriate since, as respondent and amici do not dispute, even in the context of a claim for asylum or withholding of deportation made during the deportation proceeding, the agency's decision is entitled to deference. See Gov't Br. 18-19 (citing cases); see also 8 U.S.C. 1105a(4). Under this Court's decisions in *Jong Ha Wang*, *Phinpathya* and *Rios-Pineda*, the agency should, of course, be given even greater deference in deciding whether the case of someone who has already had a deportation hearing—and who is under an order of deportation—should be reopened for further hearings.[9] Indeed, as we noted (Gov't Br. 24-25 (citing cases))—and as respondent and amici do not dispute—every circuit that has addressed the issue prior to the present case has held that the BIA's determination whether an alien has alleged a prima facie case for reopening is reviewed under a deferential abuse of discretion standard.[10]

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late review"); *INS* v. *Miranda*, 459 U.S. 14, 19 (1982) (citations omitted) (noting that because "the INS is the agency primarily charged by Congress to implement the public policy underlying [the immigration] laws[,] * * * [a]ppropriate deference must be accorded its decisions"); 8 U.S.C. 1158(a) (alien may be granted asylum "in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee"); 8 U.S.C. 1253(h) (alien shall not be deported to a country "if the Attorney General determines" that the alien's life or freedom would be threatened in that country on various grounds).

[9] Indeed, in the court below, respondent conceded that the BIA has discretion in ruling on motions to reopen and that *Rios-Pineda* is the governing authority (Abudu C.A. Br. 25).

[10] The court below (Pet. App. 7a) purported to rely on a prior Ninth Circuit decision for its de novo review standard (*Ghadessi* v. *INS*, 797 F.2d 804, 806 (1986)), but it failed

b. Respondent and amici devote considerable attention to defending the court of appeals' unprecedented rule (Pet. App. 9a) that for purposes of deciding a motion to reopen, the BIA must draw all inferences in favor of the alien. Respondent suggests (Resp. Br. 18-19, 21) that because the BIA is performing only a limited screening function in ruling on motions to reopen, the court of appeals was correct in holding that the alien must be given every benefit of the doubt. But as we have explained (Gov't Br. 33), that argument cannot be reconciled with *Jong Ha Wang*, *Phinpathya*, and *Rios-Pineda*. Such a rule would force the BIA to grant reopening and order evidentiary hearings even in marginal or insubstantial cases. Reopening would thus become not an exceptional remedy in an unusual case but a common dilatory tactic by aliens facing imminent deportation. Respondent's position[11] gives no consideration to the important interests of finality that are at stake in the context of a motion to reopen. As we noted (Gov't Br. 26-29, 33-35), a rule giving the benefit of the doubt to the alien seeking reopening finds no counterpart in other areas of administrative law[12]

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to recognize that the majority of judges in that case *rejected* that standard (see *id.* at 809 (Jameson, D.J., concurring); *id.* at 810 (Poole, J., dissenting)).

[11] While respondent strongly defends this rule announced by the court of appeals, he did not argue below for such a rule.

[12] This Court recently stated, in the context of motions to reopen Interstate Commerce Commission proceedings, that even if a party alleges new evidence, the denial of reopening will not be overturned in the absence of " 'the *clearest* abuse of discretion.' " *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), slip op. 6-7 (emphasis added; citation omitted).

or even in the criminal law.[13] There is no valid basis for adoption of such a rule in the immigration context.

Respondent and amici also make a fallback argument (Resp. Br. 24-28; AILA Br. 23-25; LCHR Br. 9-51; Centro Presente Br. 15-18) that even if the BIA is not required to draw all inferences in favor of the alien in every context, it should be required to do so in the context of motions to reopen seeking asylum or withholding of deportation. According to respondent (Resp. Br. 27), applications for asylum and withholding of deportation are unique because the alien's life or liberty may be at stake, and aliens requesting reopening to seek such relief should therefore be given the benefit of the doubt.

[13] As we noted (Gov't Br. 28), a criminal defendant seeking a new trial because of newly discovered evidence faces an extremely difficult burden, and such motions are disfavored and viewed with caution. Respondent claims (Resp. Br. 21 n.6) that motions for new trials in criminal cases are different from motions to reopen because the latter "are not generally to retry the issue of deportability; they are to seek affirmative relief from that Order." And AILA argues (AILA Br. 17) that motions for new trials, unlike motions to reopen, are concerned with past events. Neither argument is persuasive. A motion to reopen may attack the finding of deportability in addition to seeking relief from deportation, and it frequently reasserts arguments made during deportation proceedings by providing evidence that did not previously exist or was not previously available. In any event, even if the distinctions drawn by respondent and AILA were factually correct, there is no reason why the courts should give greater deference to aliens seeking to avoid deportation on the ground of newly discovered evidence than they give to criminal defendants seeking a new trial on that ground. If anything, a criminal defendant who alleges that he has uncovered evidence showing his innocence—and who thus may be wrongfully incarcerated—should be given greater deference than an alien seeking reopening, who ordinarily is in a position to seek such relief only because he has remained in this country illegally.

That argument lacks merit. As we have noted (Gov't Br. 25), the procedures for reopening deportation proceedings apply to all deportation proceedings, not merely proceedings relating to applications for asylum or withholding of deportation. Motions to reopen to apply for adjustment of status or suspension of deportation, for example, are made pursuant to the same regulatory provisions (8 C.F.R. 3.2, 3.8(a)).[14] There is no legal basis for applying the BIA's reopening provisions in different ways depending on the relief being sought by the alien. Indeed, even the court below did not attempt to justify its holding that all doubts should be resolved in the alien's favor by suggesting that the rule should apply solely to motions to reopen to apply for asylum or withholding of deportation. While it is true that this Court's statements concerning motions to reopen in *Jong Ha Wang*, *Phinpathya*, and *Rios-Pineda* arose in the context of suspension of deportation, those statements were not limited to motions seeking that particular relief. See *Jong Ha Wang*, 450 U.S. at 143 n.5. Indeed, the circuits have repeatedly applied the holdings of those cases to motions to reopen to seek asylum or withholding of deportation (Gov't Br. 24-25 (citing cases)). The interests of finality and the risk of frivolous motions exist regardless of the relief at stake.[15]

[14] As we explained (Gov't Br. 25 n.17), the requirements for reopening for the purpose of applying for asylum are, if anything, *more* exacting, since an alien must also comply with 8 C.F.R. 208.11.

[15] Because of those interests, even motions by criminal defendants claiming newly discovered evidence are looked upon

In support of his claim, respondent relies upon the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979) (*Asylum Handbook*) by the Office of the United Nations High Commissioner for Refugees. According to respondent, that authority "teaches that doubts should be resolved in favor of an alien in proving his case for refugee status" (Resp. Br. 26-27; see also LCHR Br. 30-44; Centro Presente Br. 17).[16] Respondent's argument lacks merit for three reasons.

First, the statements in the *Asylum Handbook* are contained in a discussion of procedures applicable at hearings (see *id.* at 45-49; see also LCHR Br. 35 n.9). Those statements are not necessarily relevant to post-hearing motions, since the policies applicable once an alien has had a deportation hearing and is under an order of deportation are obviously very different. See generally *Rios-Pineda*, 471 U.S. at 450 (noting that an alien "illegally present in the United States who wishes to remain * * * has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible").

Second, and related to the first, the *Asylum Handbook* states (at 45) that "[i]t is * * * left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure."

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with disfavor (see Gov't Br. 28), regardless of whether the particular defendant is incarcerated.

[16] The *Asylum Handbook* provides (at 47) that "there may * * * be statements [by the applicant for asylum] that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt." The *Handbook* also makes clear, however, that the burden of proof is on the applicant (*ibid.*).

As noted, in this country it is well established that someone who seeks to reopen a proceeding—whether criminal or civil—bears a heavy burden in overcoming the strong interest in finality. The *Asylum Handbook* recognizes that such attributes of a country's legal system cannot be disregarded.

Finally, the *Asylum Handbook*, while useful for guidance, has neither "the force of law [nor] in any way binds the [BIA] with reference to the asylum provisions of" United States law. *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 17 n.22; see also *Asylum Handbook* 1 (ii). Respondent's argument that the position taken in the *Asylum Handbook* should be adopted in the context of motions to reopen is ultimately one of policy that should be addressed to Congress, not the courts.[17]

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[17] Respondent and amici make the further argument (Resp. Br. 27; LCHR Br. 20-23) that it is often difficult for persons seeking asylum to obtain proof of persecution. But that argument provides no logical support for their position that reopening should be liberally granted. If an alien cannot muster evidence in support of his motion to reopen, there is no reason to believe that he would be able to do so at an evidentiary hearing. Here, for example, the deportation hearing occurred in 1982. And the "new evidence" cited by respondent—the visit from the Ghanian official—became known in the Spring of 1984, yet respondent did not apply for reopening until February 1985. Gov't Br. 6, 37 n.29. If, after all that time, respondent could not obtain evidence to make a showing sufficient to succeed on the merits, there is no warrant to postpone deportation further.

There is likewise no merit in AILA's claim (AILA Br. 23-24) that unless aliens are given the benefit of the doubt, the reopening procedures would conflict with the requirement of 8 U.S.C. 1158(a) that the Attorney General establish procedures for aliens, "irrespective of * * * status," to apply for asylum. The Attorney General's procedure for an alien to

3. Respondent contends for the first time that the BIA applied an incorrect legal standard in determining whether he established a prima facie case of eligibility for asylum (Resp. Br. 37-39; see also AILA Br. 7-9).[18] However, the BIA's opinion (Pet. App. 19a) demonstrates application of the correct standard. In ruling on respondent's asylum claim, the BIA explicitly relied upon the Ninth Circuit's decision in *Cardoza-Fonseca* v. *INS*, 767 F.2d 1448 (1985), which was later affirmed by this Court (No. 85-782 (Mar. 9, 1987)). Having cited the correct legal authority governing asylum, the BIA was "not required to assess the entire evidence twice, once under the heading of clear probability and a second time under the heading of well-founded fear." *Quintanilla-Ticas* v. *INS*, 783 F.2d 955, 957 (9th Cir. 1986). Even the court below did not suggest that the BIA applied the wrong legal test in assessing respondent's showing of eligibility for asylum. Thus, there is no basis for respondent's belated claim that the BIA misapplied the asylum standard. Moreover, to the extent that the claim seeks to modify the court of appeals' judgment to respondent's advantage, it

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apply for asylum after being found deportable is the motion to reopen. Nothing in the statute suggests that the Attorney General, in implementing Section 1158(a), must adopt procedures that give the benefit of the doubt to the alien.

[18] This argument is inappropriate since respondent specifically conceded below that he had "no quarrel with the principles of the law that the BIA applied in denying his Motion to Reopen" (Abudu C.A. Br. 28). Moreover, we specifically noted in our brief below that the BIA correctly applied a lower standard for asylum than for withholding of deportation (see Gov't C.A. Br. 21 n.16), and respondent, in his reply brief, expressed no disagreement with that statement.

is foreclosed in this Court since respondent filed no cross-petition under this Court's Rule 19.5.

4. Amici Centro Presente, et al., contend (Centro Presente Br. 6-9) that because withholding of deportation is *mandatory* if an alien qualifies,[19] the BIA cannot deny reopening if the alien establishes a prima facie case for such relief, even if he fails to meet the regulatory requirements for reopening.[20] That argument is erroneous. If an alien seeking withholding cannot explain his failure to seek such relief earlier and can cite no new facts, the BIA is fully justified in concluding that his motion is simply a dilatory tactic. Even in criminal cases involving claims of newly discovered evidence, a defendant's motion will be denied unless he can show that (1) the evidence was not known at the time of trial, (2) the evidence is material, (3) it would probably produce an acquittal, and (4) its belated discovery was not due to a lack of diligence on the part of the defend-

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[19] Under 8 U.S.C. 1253(h)(1), the Attorney General "shall not" deport an alien to a country if he determines that the alien's life or freedom would be threatened. The statute contains four categories of aliens to whom Section 1253(h)(1) does not apply: (1) those who committed or assisted in acts of persecution against an individual on account of race, religion, or other specified reasons; (2) those convicted of "a particularly serious" crime and who therefore "constitute[] a danger to the community of the United States;" (3) those believed to have committed a "serious nonpolitical crime outside the United States" prior to their arrival here; and (4) those who are reasonably believed to pose "a danger to the security of the United States." 8 U.S.C. 1253(h)(2).

[20] Centro Presente's argument is addressed solely to withholding of deportation. It obviously would not apply to asylum, which is *discretionary* even if the alien meets the eligibility requirements. See *Cardoza-Fonseca*, slip op. 19, 21, 28.

ant. See, *e.g.*, *United States* v. *Williams*, 816 F.2d 1527, 1530 (11th Cir. 1987).[21]

If Centro Presente were correct, aliens filing for reopening—a procedure that is entirely a creation of the Board's regulations—could ignore with impunity the various regulatory requirements established by the BIA. For example, they would have no obligation to submit affidavits or other evidentiary material or to identify their newly discovered evidence. Cf. *Jong Ha Wang*, 450 U.S. at 143 (holding that court of appeals erred in ordering reopening despite alien's failure to comply with regulatory requirements). Moreover, the consequences of such a rule would be chaotic. Since an alien seeking withholding by way of a motion to reopen would not be required to allege new facts in order to get an evidentiary hearing, he would have no incentive to seek withholding *during* the deportation proceeding. It would be in his interest simply to wait until deportation is imminent, thereby guaranteeing him a further delay while a new hearing takes place. Since Congress did not provide for reopening, even in the context of withholding of deportation, it could not have intended such a result.

In any event, the issue raised by Centro Presente is totally irrelevant in this case. The court of appeals,

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[21] Indeed, the courts have denied motions in criminal cases alleging newly discovered evidence on the ground that the defendants, after discovering the evidence, did not seek relief immediately but waited several months before filing their motions. See, *e.g.*, *United States* v. *Ochs*, 548 F. Supp. 502, 512-513 (S.D.N.Y. 1982), aff'd without opinion, 742 F.2d 1444 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984); *United States* v. *DiPuolo*, 659 F. Supp. 120, 121 (W.D.N.Y. 1987). Here, as noted (see note 17, *supra*), the new event relied upon by respondent occurred in the Spring of 1984, yet he did not file his motion to reopen until February 1985.

even when reviewing the record de novo and giving respondent the benefit of the doubt, could not conclude that he had alleged a prima facie case for withholding of deportation (see Pet. App. 11a). Thus, this case does not raise the question whether respondent should be granted reopening to seek withholding notwithstanding his failure to comply with the regulatory requirements.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.[22]

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1987

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[22] Since the filing of our opening brief, there have been developments that we wish to bring to the Court's attention. On August 28, 1987, the INS published a proposed rule that would place authority for asylum and withholding of deportation decisions in a corps of specially trained INS officers, who would interview applicants in a nonadversarial proceeding (52 Fed. Reg. 32552 (1987)). Under the proposed rule, the INS officer "may" reopen an asylum or withholding of deportation proceeding "for proper cause." In particular, he "shall grant the motion only if the evidence offered is material and was not available or could not have been discovered or presented at the original proceeding and the applicant has made a prima facie showing of eligibility * * *" (*id.* at 32558). The INS has decided not to go forward with the August 28th proposed rule in its present form, and it is currently considering publication of a revised proposed regulation to provide ways of improving the system for adjudicating asylum cases. The timing and precise content of such a proposal have not yet been determined.

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AMICUS CURIAE

BRIEF

No. 86-1128

In The

Supreme Court of the United States

October Term, 1986

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ASSIBI ABUDU,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The American Immigration Lawyers Association is a national organization of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. The Association has a direct and serious interest in the development of immigration

law and in the case now before the Court. The standard of judicial review in deportation cases involving motions to reopen to seek asylum and withholding of deportation directly affects many of the Association's members and their clients. The Association is therefore submitting this brief in support of the respondent. All parties have consented to the filing of this brief.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The government's petition in this case raises the issue of what the standard of judicial review should be in cases involving aliens seeking to reopen deportation proceedings to request asylum and withholding of deportation. The decisions of the Courts considering this issue call for use of the abuse of discretion standard in regard to those parts of the Board of Immigration Appeals' (BIA) decision involving its exercise of discretion, the substantial evidence standard in regard to the parts of the decision dealing with the establishment of whether the alien is a refugee and whether the alien has established eligibility for withholding of deportation as an alien likely to suffer persecution; and review for error in the interpretation of law. The Court of Appeals correctly found the BIA's decision in this case to be unlawful under these standards.

The government contends that the Ninth Circuit applied a de novo standard of review in this case, and further argues for the establishment of a standard at the other extreme, calling for consideration only of whether a BIA decision is "plausible". The government urges use of this restrictive approach simply because motions to reopen are

created by regulation, and are defined as such as being discretionary in nature. The government claims that the language and purposes of the Refugee Act of 1980 have no effect on the appropriate interpretation of the I.N.S. motion regulations.

This brief argues that it is not necessary to the resolution of this case to reconsider the standards of review of discretionary immigration decisions, since substantial error of law was plainly central to the BIA's decision. By its own terms, the BIA decision in this case was not based upon discretionary factors but rather upon the legal evaluation of whether the alien had established prima facie eligibility as a refugee. Application of the correct legal definition of refugee, and of correct decision making procedures, would have mandated an opposite result.

The Board's decision was reached at a time when it considered "insignificant" the difference in the standard of proof between a "well founded fear of persecution", for political asylum eligibility, and a "clear probability of persecution", for withholding of deportation eligibility. It thus judged Dr. Abudu's asylum claim under the more stringent "clear probability" standard only. The Board's legal position on these issues was ruled to be incorrect by this Court in *I.N.S. v. Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987).

The Ninth Circuit decision simply evaluated the facts under what the correct legal standard should have been, whether the alien "could reasonably have feared persecution". Finding that the alien's proof satisfied this standard, the Court correctly ruled that the Board's denial of the motion was not in accord with law. Dr. Abudu and

other aliens with asylum claims improperly denied during the period of the Board's use of a faulty standard of proof should be permitted to have those claims considered under the proper legal standard.

The standard of review issue raised by the government, should be decided, if at all, in view of the long standing rules of judicial review of immigration cases as affected by the goals and language of the Refugee Act of 1980. Neither of these areas offer support for the government's argument to further restrict the scope of judicial review.

The procedure of the I.N.S. motion to reopen deportation proceedings is an agency action of structured discretion appropriate for judicial review. The motion to reopen, created by the agency, has its own safeguard against abuse, the agency's discretionary power over whether to stay an order of deportation. There are two desirable purposes of the motion to procedure. One of these is to relieve the Courts from consideration of cases that would otherwise have to be raised in habeas corpus proceedings. The other is to provide better justice to aliens who might otherwise be unjustly deported, due to changes of circumstances or because of the possibility of error inherent in streamlined agency proceedings. To the extent that judicial review can keep decisions on motions with the bounds of law and agency policy, it assures the integrity of the procedure, to achieve these purposes.

Petitions for review of I.N.S. deportation orders pursuant to 8 U.S.C. 1105a have long been considered under the substantial evidence standard for issues of fact, the abuse of discretion standard for exercise of discretion,

and the error of law standard for interpretations of law. *I.N.S. v. Cardoza-Fonseca*, supra.; *Woodby v. I.N.S.*, 385 U.S. 276 (1966). The government's broad arguments fail to distinguish these issues in the manner directed by these precedents. The decision of the Court of Appeals was simply a correct resolution of the issue of law of whether a prima facie case of eligibility for asylum had been established. The motion to reopen procedure is properly considered in Section 1105a review under the same standards as other I.N.S. deportation decisions, regardless of whether the procedure was created by I.N.S. regulation. *Giova v. Rosenberg*, 379 U.S. 18 (1964); *Foti v. I.N.S.*, 375 U.S. 217 (1963). The legislative history of Section 1105a contemplated Court review of I.N.S. motions to reopen through "close study" of the important issues involving aliens' liberty.

The Refugee Act of 1980, at 8 U.S.C. 1158(a), created the discretionary benefit of asylum for refugees in the United States. However, it also introduced the nondiscretionary right of aliens in the U.S. to *apply for* asylum, *irrespective* of their status. It also mandated that the Attorney General create a procedure to effectuate this right. It further mandated that the government is barred from deporting an alien to a country where he would be persecuted, 8 U.S.C. 1253(h).

The I.N.S. has chosen to effectuate these rights and duties throughout the pre-existing, discretionary motion to reopen procedure. Any conflict between the statutory right and the old regulations must be resolved in favor of the statute. At 8 C.F.R. 208.11, the I.N.S. created special regulations governing motions to reopen for the new statutory benefit of asylum. This regulation can be interpreted

as recognizing the broader right to a hearing in such cases, as opposed to other deportation matters. The BIA has not yet ruled on a case requiring interpretation of the regulation, other than in a dicta context. The dicta statements of the BIA have rejected recognition of the statutory right to apply for asylum, and thus must be found to be contrary to law.

The Court has recently recognized the very limited nature of the due process afforded to aliens in deportation proceedings. *United States v. Mendoza-Lopez* No. 85-2067 (May 26, 1987). The Court has also recently recognized the need for flexibility in responding to the claims of aliens who may face death or persecution if forced to return to their home countries. *I.N.S. v. Cardoza-Fonseca*, No 85-782 (Mar. 9, 1987). The everyday realities of the deportation processes are that many aliens are placed in deportation proceedings without knowledge of their rights to request asylum; are in custody far from friends, families or legal assistance; and are thus under pressure in summary, mass hearings to waive the limited rights they may have. The flexibility genuinely needed to effectuate the purposes of the Refugee Act of 1980 calls for rejection of the limited standard of review urged by the government in motions to reopen deportation proceedings to request asylum and withholding of deportation.

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II. ARGUMENT

A. A SIGNIFICANT ERROR OF LAW RENDERED THE BIA DECISION UNLAWFUL

A detailed reevaluation of the issues of judicial review is not necessary for the resolution of the case before

the Court. It is axiomatic that a deportation order grounded upon a misinterpretation of the immigration statute must be held to be invalid. *I.N.S. v. Cardoza-Fonseca*, No. 85-782 (March 9, 1987); *Barber v. Gonzalez*, 347 U.S. 637 (1954); *Tan v. Phelan*, 333 U.S. 6 (1948).

The deportation order in Dr. Abudu's case was based upon the BIA's finding that his proof was insufficient to establish a prima facie case of a "well founded fear of persecution", the criteria defining refugees eligible for asylum in the United States. 8 U.S.C. 1158(a); 8 U.S.C. 1101 (a)(42)(A). This standard was held by the Supreme Court in *Cardoza-Fonseca* to be different from, and less demanding than, that of 8 U.S.C. 1153(h). That section mandates "withholding of deportation" of an alien from a country if he has established that it is more likely than not that he will suffer persecution upon his return. *I.N.S. v. Stevic*, 467 U.S. 407 (1984). The Court in *Cardoza-Fonseca* did not attempt to set forth a detailed description of how the well-founded fear standard should be applied, but did rule that the standard did not demand that an alien prove that it is more likely than not that he or she will suffer persecution. The Court noted that a "reasonable possibility" of persecution should suffice under a moderate interpretation of the statute. Prior to the ruling of the Court in *Cardoza-Fonseca*, this was decidedly not the standard employed by the BIA in adjudicating claims of asylum.

Dr. Abudu's motion to reopen deportation proceedings to request asylum was filed on Feb. 1, 1985. One month later, on March 1, 1985, the BIA issued its precedent decision, *Matter of Acosta*, Interim Decision 2986(1985). In that decision, the BIA reviewed the conflict within the circuits on the well-founded fear standard. It noted the posi-

tion of the Court of Appeals for the Ninth Circuit in *Bolanos-Hernandez v. I.N.S.*, 784 F.2d 1316, that the well-founded fear standard meant that the alien had "good reason" to fear persecution and that the well-founded fear standard was "more generous" than the standard for withholding. The BIA proceeded to reject the Ninth Circuit's interpretation, ruling that the two standards were "not meaningfully different".

When the Ninth Circuit later issued the decision of *Cardoza-Fonseca v. I.N.S.*, 767 F.2 1448 (9th Cir. 1985), the BIA took note of it in *Matter of Sanchez and Escobar*, Interim Decision No. 2996 (1985), issued on Oct. 15, 1985. The BIA adopted that portion of Ninth Circuit's decision requiring specific, objective facts supporting an inference of the risk of persecution. The BIA noted that the Court of Appeals had also ruled that "the well founded fear standard and the clear probability standard are meaningfully different and that the former is more generous than the latter." However, the Board simply responded by stating that "The Board's analysis of this standard is set forth in *Matter of Acosta.*" Although the *Sanchez and Escobar* case had arisen in the jurisdictional area of the Court of Appeals for the Ninth Circuit, the BIA felt no need to align its enforcement of the law with the interpretation of the Court of Appeals for that circuit, choosing instead a policy of quiet defiance.

Three weeks after the *Sanchez and Escobar* decision, on Nov. 7, 1985, the BIA issued its unreported decision rejecting Dr. Abudu's motion. (Dr. Abudu's case also arose in the jurisdiction of the Ninth Circuit.) In its decision, the BIA again cited the need for specific, objective facts, as required by the Court of Appeals in *Cardoza-Fonseca*,

but made no particular reference as to which standard of proof was being employed. Plainly, it still had not retreated from the *Acosta* standard that it had reasserted only three weeks earlier.

In view of the Supreme Court's decision in *Cardoza-Fonseca* on March 9, 1987, the BIA has recently issued a new precedent, *Matter of Mogharrabi,* Int. Dec. 3028 (June 12, 1987). The BIA therein noted that "our decision in *Matter of Acosta* has been effectively overruled" by the Supreme Court's decision in *Cardoza-Fonseca.* The Board proceeded, seven years after the enactment of the Refugee Act of 1980, to finally adopt an interpretation consistent with the statute. It thus ruled that "an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution. . . . Moreover, a reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable." In regard to the level of proof needed, the Board ruled that "we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence . . . . . the lack of such evidence will not be fatal to the application."

In a further development, as reported at Vol. 64, No. 24 of Interpreter Releases Report and Analysis of Immigration and Nationality Law, pg. 775, the I.N.S.' Central Office has issued the following policy memrandum:

SUBJ: REOPENING OF ASYLUM REQUESTS FOLLOWING CARDOZA-FONSECA

REF: COEXM MEMO (CO 208-P), 3/24/87, "SUPREME COURT DECISION IN INS V. CARDOZA-FONSECA"

IN LIGHT OF THE SUPREME COURT DECISION IN CARDOZA-FONSECA, SERVICE OFFICES SHOULD EXPECT A SUBSTANTIAL NUMBER OF MOTIONS TO REOPEN OR RECONSIDER FILED BY DENIED ASYLUM APPLICANTS WITH BOTH DISTRICT DIRECTORS AND IMMIGRATION JUDGES. SUCH MOTIONS SHOULD BE CONSIDERED IF THE APPLICANTS RELATE SPECIFIC EVIDENCE TO THE LESSER STANDARD OF EVIDENCE WHICH THE SUPREME COURT LAID DOWN IN CARDOZA-FONSECA. ADJUDICATION OF THE UNDERLYING CLAIM SHOULD THEN BE IN KEEPING WITH THE CARDOZA-FONSECA DECISION.

WHEN SUCH MOTIONS ARE ACCEPTED, EMPLOYMENT AUTHORIZATION SHOULD BE NORMALLY GRANTED FOR SIX MONTHS OR UNTIL A DECISION IS LIKELY TO BE RENDERED ON THE MOTION AND CLAIM.

QESTIONS RELATED TO THIS POLICY SHOULD BE DIRECTED TO RALPH THOMAS, CORAP (8-633-5463) OR ANN ARRIES, COCOU (8-633-2620).

It is clear that there was sufficient evidence to justify reopening under what has now become the I.N.S. standard policy. Like the alien in *Cardoza-Fonseca,* Dr. Abudu feared official retaliation due to association with his brother and other prominent enemies of his home country's government. Presenting even stronger evidence than Ms. Cardoza-Fonseca, Dr. Abudu had his fears personally substantiated when a cabinet level official from his home country visited him in the U.S., asked how to find the exiled brother, asked about the political associates, and urged Dr.

Abudu to return home. Corroborating State Department and Amnesty International reports of coup attempts from abroad and persecution of suspected conspirators were submitted, along with an affidavit from the former Minister of State from the home country, confirming Dr. Abudu's story on all counts. It is an established rule that an alien's credible testimony coupled with general documentary, expert or academic evidence is sufficient to establish prima facie qualification as a refugee. *McMullen v. I.N.S.,* 658 F.2d 1312, 1318 (9th Cir. 1981); *Ananeh-Firempong v. I.N.S.,* 766 F.2d 621 (1st Cir. 1985).

The approach of the BIA was to require even more corroboration, and to question the key evidence of substantiation of the singling out of Dr. Abudu, that is, the official visit, by arguing that the foreign official "may have been paying a purely social call". This approach exemplifies the importance of which standard is being used. As was pointed out in the decision of the Court of Appeals, "While the visit from the Ghanian official could be viewed as benign, it could also be viewed, as Dr. Abudu suggests, as threatening." Under the "reasonable person" standard, the central issue was not whether the visit might have been social, but only whether Dr. Abudu was reasonable in viewing it as threatening. Not using the correct standard, the BIA pretermitted this question altogether. The failure to exercise discretion favorably due to misinterpretation of the statute renders an ensuing deportation order improper. *Kovac v. I.N.S.,* 407 F.2d 102, 107 (9th Cir. 1969). *McGrath v. Kristensen,* 340 U.S. 162 (1950). Aliens such as Dr. Abudu have been denied asylum during the period described in Justice Blackmun's *Cardoza-Fonseca* concurring opinion as "years of seemingly purposeful blindness

by the I.N.S.''. It is strictly a matter of confirming the rule of law to find, as the Court of Appeals did, that the Board's denial of reopening cannot be sustained because it was not in accordance with law.

B. THE PURPOSES OF THE MOTION TO REOPEN PROCEDURE ARE BEST SERVED BY MEANINGFUL JUDICIAL REVIEW

The Immigration motion to reopen is an administrative decision involving the application of law, resolution of facts, and exercise of discretion. Review of a motion decision requires familiarity with the agency's own standards.

> ''In the absence of standards in the statute itself, proper administration would be advanced and reviewing courts would be assisted if the Attorney General or his delegate, without attempting to be exhaustive in an area inherently insusceptible of such treatment, were to outline certain bases deemed to warrant the affirmative exercise of discretion and other grounds generally militating against it.''

Wong Wing Hang v. I.N.S., 360 F.2d 715, 718 (2nd Cir. 1966)

The immigration motion to reopen is an administrative remedy of long standing utility. Like the Board of Immigration Appeals, the motion is not mentioned in the Immigration and Nationality Act. Both the BIA and the motion were created by the Attorney General's regulations. Both were in existence prior to the enactment of the 1952 Immigration and Nationality Act. See *In the Matter of B.* 1 I. & N. Dec. 47 (1941).

The regulations promulgated by the Attorney General after the 1952 enactment have remained largely unchanged

over the years. They allow either the alien or the government to seek reopening of proceedings before the Board. In 1962, the regulations were amended to add the requirement that motions be based upon new evidence, not discoverable at the time of the original hearing. (27 FR 96) After the enactment of the Refugee Act of 1980, promulgation of 8 C.F.R. 208.11 added specific guidelines on motions concerning asylum, apparently giving recognition to the fact that the 1980 Act had special bearing on the I.N.S. treatment of motions to reopen. In 1987 the regulations were amended to specifically require that completed applications must be submitted with motions seeking reopening to apply for a particular immigration benefit before the Immigration Court. In promulgating this recent change, the I.N.S. noted that some commenters had called for doing away with the motion remedy altogether. This claim was rejected by the I.N.S., which indicated satisfaction with the existing motion procedure. (52 FR 2933, Jan. 29, 1987).

The existing regulatory motion procedure contains a strong safeguard against frivolous motions, in its provision that the ''filing of a motion to reopen or reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case''. 8 C.F.R. 3.8(a).

The rules on immigration motions have been further refined by the published precedent decisions of the BIA and I.N.S. Commissioner, which, by regulation, are binding on all I.N.S. employees. 8 C.F.R. 103.3(e). In 1972, a pair of published precedents introduced the requirement

that an alien seeking to reopen for a particular immigration benefit must submit proof establishing a prima facie case of eligibility for the relief sought. *Matter of Sipus,* 14 I.N. Dec. 229 (1972); *Matter of Lam,* 14 I.N. Dec. 98 (1972).

Precedent decisions have also set some standards for the exercise of discretion on motions to reopen. Thus, where acquisition of the required period of residence for the benefit of suspension of deportation was acquired only through resort to dilatory appeals, this was ruled to be an adverse factor mandating discretionary denial of the motion, absent any compelling counterbalancing circumstances. *Matter of Lam,* 14 I.N. Dec. 98 (1972). The Supreme Court later found such a rule to be a proper exercise of the Attorney General's discretion. *I.N.S. v. Rios Pineda.* 471 U.S. 444 (1984).

The regulations offer "negative" guidance on the discretionary aspect of the motion decision, stating that the motion "shall not be granted" unless the various regulatory requirements are met. However, published Board precedent establishes that upon presentation of a prima facie case for the requested immigration benefit, and absent negative discretionary factors, discretion should generally be favorably exercised. *Matter of Garcia,* 16 I. and N. Dec. 653, 657 (1978); See Hurwitz, "Motions Practice Before the Board of Immigration Appeals", 20 San Diego Law Review 79 (1982).

The regulations and precedents of the I.N.S. set the framework for a fair motion to reopen procedure calculated to ensure the opportunity for relief from deportation to aliens whose changed circumstances make such re-

lief appropriate, while guarding against frivolous misuse of the procedure. The standards for providing reopening and relief to "prima facie" eligible aliens have not been imposed by the Courts, but rather are the result of the Agency's own efforts to effectuate the goals of the immigration statute, through the evolution of over thirty-five years of the collective experience and varying concerns of agency administrators. The agency has used its regulatory and decision making powers to set standards to define and control use of the discretionary procedure, rather relying upon unstructured or unreviewable discretion. The careful structuring of the discretionary motion procedure, through the regulations and precedent decisions, serves to provide a more even-handed, consistent exercise of discretion to aliens seeking reopening, and to provide reviewing courts with meaningful guidelines for review. See Davis, "Discretionary Justice, A Preliminary Inquiry", Chapter IV, Structuring Discretion, Chapter V, Controlling Discretion. University of Illinois Press (1979).

As has been pointed out in the government brief, the concept of reopening is sometimes disfavored in other types of administrative and criminal proceedings. Why then, it might be asked, has the I.N.S. created a procedure affording this benefit to aliens upon a prima facie showing? One reason might well be that of judicial economy. Unlike an order from the Federal Energy Commission or National Labor Board, an order of deportation entails the deprivation of an individual's liberty. Where the individual can establish the illegality of such order, he can take advantage of the Constitutional protection of requesting a United States District Court to issue a writ of habeas corpus, to compel the I.N.S. to show cause why the order should not

be stricken. 8 U.S.C. 1105a(9); *Heikkila v. Barber,* 345 U.S. 229 (1953); *Bridges v. Wixon,* 326 U.S. 135 (1944). The creation and implementation of a motion procedure within the agency, in a great many cases, relieves the Courts from having to grant hearings to determine whether aliens' changed circumstances have rendered deportation orders unlawful. Therefore, to the extent that judicial review ensures that individual case decisions conform to the agency's own motion regulations and precedents, such review ensures the integrity of a process calculated to provide an overall reduction in the amount of judicial review needed.

The government notes that, out of "tens of thousands of deportation cases each year" the BIA decided a total of 114 motions to reopen in the past one year period. One hundred and fourteen cases comes to less than one percent of "tens of thousands". In its brief to the Supreme Court in *Rios Pineda,* supra, the government noted that the Board had decided 450 motions to reopen in 1983. The trend would seem to be decidedly downward.

Motions to reopen are generally made by aliens to seek one of three forms of relief. One, adjustment of status to permanent residence, pursuant to 8 U.S.C. 1255, is usually based upon a marriage to a U.S. citizen occurring after the deportation proceeding. Another, suspension of deportation, is based upon acquisition of seven years of U.S. residence and proof of extreme hardship that could result from deportation (8 U.S.C. 1254). The third is asylum and withholding of deportation.

Recent changes in the immigration laws should very substantially reduce the numbers of persons seeking re-

opening in the first two categories. The Immigration Marriage Fraud Amendments of 1986 (Pub. L. No. 99-639 (Nov. 10, 1986)) completely bar adjustment of status on the basis of a marriage, if the marriage occurred after the commencement of deportation proceedings. This should eliminate almost all motions in the first category. The Immigration Reform and Control Act of 1986 (Pub. L. No. 99-603 (Nov. 6, 1986)) provides for the "legalization" of aliens residing unlawfully in the U.S. since January 1, 1982. The vast majority of persons eligible for suspension of deportation will qualify for legalization. The current policy of the BIA and Immigration Judges is to "administratively close" the deportation proceedings of such persons, preferring that they seek legalization rather than the more complex remedy of suspension of deportation. The government's standard "flood of cases" argument for restrictive review is thus completely unwarranted, coming at a point in history when sweeping statutory changes will reduce the already declining numbers of motions to reopen.

In considering the motion procedure established by the I.N.S., we do not claim that judicial economy was the only motivation for its creation. Simple justice is also certainly one of its purposes. A deportation order is based upon the status of an alien, his family situation, and the presence or absence of hardship or persecution upon return to his homeland. Unlike the decision in a criminal case, it often is not so much the occurrence of some past event that is determinative, but rather the effect of deportation in the future. When circumstances change, it is only just to change an order of deportation that is no longer appropriate.

Unlike decisions in other administrative cases, many of the fair hearing requirements of the Administrative Procedure Act do not apply to deportation proceedings, *Marcello v. Bonds,* 349 U.S. 180 (1956). Many of the protections of criminal procedures are also unavailable. The warnings mandated by *Miranda v. Arizona,* 384 U.S. 436 (1986) are not required in the deportation context. *U.S. v. Alderate-Deras,* 743 F.2d 645, 647 (9th Cir. 1984). The right to counsel during pre-hearing, custodial interrogation, *Escobedo v. Illinois,* 378 U.S. 478 (1964), is not available, *Lavoie v. I.N.S.,* 418 F.2d 732, 734 (9th Cir. 1969), cert. denied, 429 U.S. 1044 (1977). No eighth amendment bail right is available, *Carlson v. Landon,* 342 U.S. 524 (1952); nor any sixth amendment speedy trial right, *Argiz v. U.S. I.N.S.,* 704 F.2d 384, 387 (7th Cir. 1983). No right to appointed counsel exists for indigent aliens in deportation proceedings. *Chlomos v. I.N.S.,* 516 F.2d 310, 314 (3rd Cir. 1975). The exclusionary rule, to protect against Fourth or Fifth Amendment violations, is unavailable in deportation proceedings, *I.N.S. v. Lopez-Mendoza,* 468 U.S. 1032 (1984). Simultaneous translation for non-English speaking aliens is not required, *Matter of Exilus,* 18 I. & N. Dec. 276 (1982). Mass hearings can and do take place under the law, *U.S. v. Nicholas-Armenta,* 763 F.2d 1089 (9th Cir. 1985).

Even under the fairest of circumstances, the very complexity of the immigration statute can deprive an alien of effective legal advice. Apparently, Dr. Abudu's first attorney, although warned by the Judge, did not comprehend the special disabilities under the immigration statute for aliens convicted of drug related crimes, as opposed to other criminal violations. It may have been

this error that prevented Dr. Abudu from pursuing his asylum request earlier.

The very limited rights, summary procedures, and complexity of the statute all contribute to a legal process where the chances of error and misunderstanding are great. If these drawbacks have been found to be necessary evils of the need for expeditious proceedings, at least some judicial support should be given for the agency's attempt to provide a counterbalancing corrective procedure in the motion to reopen.

The motion to reopen procedure is plainly designed to accomplish the goal of improving the quality of justice in the enforcement of the immigration laws. Judicial review of this discretionary process, assuring compliance with law and agency policy in individual cases, contributes to the agency's own goal of providing the highest quality of justice possible.

C. THE STANDARDS OF JUDICIAL REVIEW CITED BY THE COURT OF APPEALS ARE BASED ON THE REQUIREMENTS AND INTENT OF THE STATUTE, AS WELL AS LONG ACCEPTED PRECEDENT

The statutory basis for judicial review of deportation orders is found at 8 U.S.C. 1105a, enacted as Sec. 5 of Public Law 87-301, in 1961. The statute was found to be applicable to discretionary decisions, made in the context of deportation proceedings, in *Foti v. I.N.S.,* 375 U.S. 217 (1963). The Court in *Foti* noted that section 4 of the statute provides for "substantial evidence" review of factual determinations made in deportation proceedings, and suggested that for mixed factual and discretionary

benefits, such as suspension of deportation, the factual aspects of the I.N.S. decision should be reviewed under the "substantial evidence" standard, while the discretionary aspects should be reviewed under the "abuse of discretion" standard, *Foti v. I.N.S.* supra, pg. 228, 229, Footnote 15. This suggestion was later specifically adopted in *Woodby v. I.N.S.,* 385 U.S. 276 (1966). This use of distinct standards of review for discretion, fact, and law has continued to be found appropriate and useful in immigration cases, *I.N.S. v. Cardoza-Fonseca,* No. 85-782 (March 9, 1987); *I.N.S. v. Bagamasbad,* 429 U.S. 24 (1976); *Wong Wing Hang v. I.N.S.,* 360 F.2A 715 (2nd Cir. 1966). This process of review has been specifically applied in the asylum context. *McMullen v. I.N.S.,* 658 F.2d 1312, 1316 (9th Cir., 1981). The arguments of the government fail to make these basic distinctions in urging that all aspects of the motion to reopen are reviewable for abuse of discretion only.

The government urges that motions' review should be limited simply because the motion procedure was created by regulation rather than by statute. However, in *Foti,* the Court indicated that "We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review" *Foti v. I.N.S.* supra at 229. The Court was there referring to the inclusion, solely by regulation at the time, of withholding of deportation in the consideration of the deportation proceeding. It certainly did not suggest that the regulatory basis of the inclusion should justify a lesser standard of review.

It is clear that, in enacting Section 1105(a), the Congress contemplated that the then existing motion to reopen procedure would be included in the petition for review process that it created. The legislative history indicated the intention to "eliminate repetitious and unjustified appeals . . .", with the prominent exception, however, "unless his new petition presents grounds which could not have been presented in the prior proceeding" U.S. Code Congressional and Administrative News, H.R. Rep. No. 1086, 87th Congress, (1961) Vol. 2, pg. 2973. When, after the law was enacted, the Ninth Circuit ruled that motions to reopen were not within 1105a jurisdiction, *Giova v. Rosenberg,* 308 F.2d 347 (9th Cir. 1962), both the government and the alien successfully argued that the ruling be reversed, *Giova v. Rosenberg,* 379 U.S. 18 (1964). As noted above, the I.N.S. motions regulation was amended in 1962 to add the requirement of a showing of new grounds, apparently in recognition of the 1961 statute.

The nature of the review contemplated by the Congress was plainly not the bare test of plausibility now urged by the government. The report stated that "Since deportation proceedings deal with the liberty of persons rather than mere property, the committee has concluded that granting an initial review in an appellate court gives the alien greater rights, greater security, and more *assurance of a close study of his case by experienced judges.*" Ibid., at 2972 (emphasis added). Only by failing to consider the statute, its purposes, and its long standing interpretations, can one argue for the limited level of review urged in the government's brief.

D. THE COURT OF APPEALS CORRECTLY REVIEWED THE "PRIMA FACIE" CASE ISSUE AS A QUESTION OF LAW, IN THE APPLICATION OF LAW TO THE FACTS ALLEGED

As noted above, the I.N.S. itself has required that aliens seeking to reopen deportation proceedings should establish a prima facie case through supporting affidavits.

The agency has not provided a definition of "prima facie case". *Matter of Sipus,* 14 I. & N. Dec. 229, 231 (1972). The plain meaning of the words, however, is that the evidence presented be examined without rebuttal, to determine whether it establishes a case under the law.

> "*Prima facie case* n: a case established by prima facie evidence
>
> *Prima facie evidence* n: evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted."
>
> Webster's Third New International Dictionary; Merriam Webster Inc., (1981).

The government's reliance on *I.N.S. v. Jong Ha Wang,* 450 U.S. 139 (1981), to claim that the prima facie determination itself is discretionary, is misplaced. The Court in *Wang* analyzed whether the aliens' evidence submitted in support of their motion to reopen established the prima facie "extreme hardship" needed for suspension of deportation. The Court used the same mode of review as employed in the *Abudu* case, that is, treating the question as one of law, rather than of fact or exercise of discretion. The Court stated that the "definition" of the "extreme hardship" requirement was the "crucial question" in the

case, *Wang,* supra at 144. The Court ruled in favor of the narrow construction of the I.N.S., rather than the liberal construction of the Ninth Circuit, both because of its deference to the agency's expertise, and because the "narrow interpretation is consistent with the extreme hardship language, which itself indicates the exceptional nature of the suspension remedy." *Wang,* supra, at 145. Analysis of definitions, interpretation, and statutory language are plainly issues of law, not issues of abuse of discretion.

Similarly, in *I.N.S. v. Stevic,* 467 U.S. 407, 430 (1984), after determining the correct legal interpretation for withholding of deportation in a motion to reopen case, the Court ruled that its holding would "require the Court of Appeals to reexamine this record to determine whether the evidence submitted by respondent entitles him to a plenary hearing under the proper standard." Such was precisely the action taken by the Ninth Circuit in the instant case.

E. THE PURPOSES OF THE REFUGEE ACT OF 1980 WOULD BE DISSERVED BY RESTRICTING THE REVIEW OF MOTIONS TO REOPEN TO REQUEST ASYLUM

The Refugee Act of 1980 added Section 1158(a) to the Immigration law, which provides that:

> "The Attorney General *shall* establish a procedure for an alien physically present in the United States or at a land border or port of entry, *irrespective* of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." (emphasis added)

The statute does not restrict aliens seeking to request asylum to those in the status of being not yet in, or in deportation proceedings, but requires a procedure allowing applications "irrespective of such alien's status." It should not be presumed that the Congress used such broad language without purpose. No other immigration benefit is made available on such a broad basis. For example, applicants for adjustment of status to permanent residence under 8 U.S.C. 1255 are permitted to apply to the Attorney General only "under such regulations as he may prescribe." The Court has recently recognized the Congressional purpose to provide increased "flexibility" to aliens seeking asylum, due to the issues of possible death or imprisonment not present in other deportation cases *I.N.S. v. Cardoza-Fonseca* No. 85-782 (March 9, 1987). If there is any conflict with the discretionary regulation it must be resolved to guarantee the statutory right of actual consideration of asylum applications.

The recent history of I.N.S. implementation of the Refugee Act hardly justifies a retreat from judicial review. As noted above, the I.N.S. has, until very recently, applied an unduly harsh interpretation of the well-founded fear standard, in defiance of the interpretation of the United States Court of Appeals. In *Orantes-Hernandez v. Smith,* 541 F. Supp. 351 (C.D.Cal. 1982) the Court found a nationwide pattern of I.N.S. abuse in coercing Salvadoran aliens to accept uninformed waivers of their rights to deportation hearings, assistance of counsel, and to apply for political asylum. In *Haitian Refugee Center v. Smith,* 676 F.2d 1023 (5th Cir. 1982), affirming *Haitian Refugee Center v. Civietti,* 503 F.Supp. 442 (S.D. Fla. 1980), it was found that an I.N.S. "Haitian Program" had been

violative of the Haitian aliens' rights to due process by scheduling mass hearings, interfering with their right to assistance of counsel by knowingly scheduling conflicting hearings, setting unattainable filing deadlines for political asylum applications, and failing to afford an opportunity for full presentation of individual cases. *Haitian Refugee Center,* 676 F.2d at 1040.

With the I.N.S. now only beginning to comply with the requirements of the Refugee Act, it is not now appropriate to issue a decision that would restrict review of cases decided under an improperly restrictive interpretation.

F. THE ISSUE OF WHETHER REOPENING SHOULD BE DENIED TO A REFUGEE, DUE TO FAILURE TO TIMELY ASSERT HIS CLAIM, IS NOT RIPE FOR REVIEW

The BIA rejected Dr. Abudu's motion both because it claimed he had failed to establish a prima facie case of refugee eligibility and also because it claimed that he had failed to satisfy the requirement of 8 C.F.R. 3.2 and 8 C.F.R. 208.11, that his claim was "sought on the basis of circumstances which have arisen subsequent to the hearing." We agree with the Court of Appeals that the BIA's ruling on that issue was not supported by the evidence. However, we also urge that the issue must be considered by the Board anew, since the Board has never actually ruled that an alien who in fact does establish prima facie refugee eligibility should be denied reopening simply because he asserted his claim too late.

The I.N.S. published precedents on this issue present the question in the same "dicta" posture as Dr. Abudu's case, in which the BIA had also found no prima facie case

existed anyway. *In re Escobar,* 18 I. & N. Dec. 412 (1983); *Matter of Martinez-Romero,* 18 I. &. N. Dec. 75 (1981). Surveys of unpublished BIA decisions also fail to detect any in which an alien found to have established refugee eligibility has actually been denied reopening. See Helton, "The Proper Role of Discretion in Political Asylum Determinations," 22 San Diego Law Review 999, 1006-1009 (1985).

The regulation dealing with the issue, 8 C.F.R. 208.11, implies that such a decision would in fact be an improper exercise of discretion. It provides that:

> " . . . Such request must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, *absent any evidence to the contrary.*" (emphasis added)

The last phrase implies that if prima facie eligibility is present, then the application should not be considered frivolous, and perhaps the motion should be granted. No such forgiving phrase can be found in the more general motion regulation at 8 C.F.R. 3.2. The distinction in the asylum motion regulation might well be based upon the agency's recognition of the special flexibility appropriate in asylum claims.

As argued in the previous section, if this issue must be resolved now, we urge that the statute's mandate to the Attorney General, to allow aliens to seek asylum irrespective of their status, *compels* the granting of a hearing upon presentation of a prima facie case.

The statute's mandatory requirement of withholding of deportation, 8 U.S.C. 1253(h), for aliens who establish a

clear probability of persecution, also bears on this issue. If an alien's motion established such probability, the denial of reopening due to lack of explanation of failure to make an earlier application would be an ultra vires act by the Attorney General. These significant issues ought to be resolved in the first instance at the agency level, to clarify the issues and the I.N.S. positions, before being reviewed in this Court.

—o—

III. CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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BRIEF

No. 86-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

ASSIBI ABUDU,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* LAWYERS COMMITTEE FOR HUMAN RIGHTS

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INTEREST OF AMICUS

Amicus Curiae, the Lawyers Committee for Human Rights, offers this brief in support of petitioner, Dr. Assibi Z. Abudu.

The Lawyers Committee for Human Rights (the "LCHR") is a national legal resource center working in the area of human rights, refugee and asylum law. In 1980, the Committee created a national Political Asylum Project to monitor proposed legislation and regulations, to litigate significant cases regarding refugees and asylum, and to assist in providing legal representation for applicants for political asylum.

In the representation area, the LCHR's Asylum Project uses volunteer lawyers to represent deserving asylum-seekers irrespective of their nationality. Aside from its program in New York

City, which provides assistance to over 150 individuals each year including asylum applicants in detention, the LCHR project works nationally to encourage and support private bar involvement in the asylum area. Since 1982, the Asylum Project has trained and provided practice materials to over 1,500 volunteer lawyers who represent indigent Haitian asylum applicants. See Helton, The Haitian Pro Bono Representation Effort, 12 Hum. Rts., ABA, Fall 1984, at 19. In recognition of the unique needs of asylum-seekers for the effective assistance of counsel, and the interest of the private bar in meeting those needs, the Asylum Project is helping to organize and support volunteer lawyer programs to represent asylum applicants in Boston, New York, Miami, New Orleans, Houston and Los Angeles. The LCHR submits this brief because it believes the resolution of this case may effect numerous others involving applications for relief under the Refugee Act.

STATEMENT OF CASE

This case arises from the denial by the Board of Immigration Appeals (the "BIA") of a motion by Dr. Assibi L. Abudu, a citizen of Ghana, to reopen deportation proceedings against him in order to permit him for the first time to apply for asylum and withholding of deportation pursuant to the Refugee Act of 1980. Abudu v. INS., 802 F.2d 1096, 1098-99 (9th Cir. 1986), cert. granted, ____ U.S. ____, ____ 107 S. Ct. 1564, 1565 (1987).

Dr. Abudu initially entered the United States as a student. Brief for Petitioner at 3. The Immigration and Naturalization Service (the "INS") commenced deportation proceedings against

Dr. Abudu on November 3, 1981, on the basis of minor drug-related offenses. Brief for Petitioner at 3. At that time, the government of Dr. Hilla Limann, widely criticized for its human rights abuses, was in power in Ghana. See Amnesty International Report 1982, 41, Record at 46. At a hearing on November 10, 1981, Dr. Abudu expressed an intent to apply for asylum. Brief for Petitioner at 5.

On April 29, 1982, Dr. Abudu's counsel said that Dr. Abudu would apply instead for adjustment of status based on his marriage to a U.S. citizen. Id. at 5-6. On July 1, 1982, Dr. Abudu was found deportable and his application for adjustment of status was denied. Abudu, 802 F.2d at 1098.

In 1982, the new government of Ghana, led by Flight Lt. Jerry Rawlings,

pursued a policy of renewed political repression and human rights abuses, see Amnesty International Report 1983, 41-42, precipitating two unsuccessful coup attempts in the middle of 1983. Abudu, 802 F.2d at 1099. Dr. Abudu's brother, a publicly-declared enemy of the regime, escaped from Ghana and now lives in hiding, afraid to make his whereabouts known. See Affidavit of Balko Alhassan Kante, at 4-5 ("Kante Affidavit"); Affidavit of Assibi Z. Abudu, M.D., at 2 ("Respondent's Affidavit"). Dr. Abudu's life-long friend, Lt. Col. Joshua Hamidu, was declared by the regime to be its principal enemy. Brief for Petitioner at 7.

In 1984, Dr. Abudu was visited in the United States by Mr. Abukari Alhassan, Secretary of Housing and Construction in the Rawlings regime. Re-

spondent's Affidavit at 5. At one time, Alhassan had been a member of the political opposition to Rawlings; before his defection to Rawlings, he had been a friend of Dr. Abudu. Id. at 5-6. While encouraging Dr. Abudu to return to Ghana, Alhassan asked Dr. Abudu questions about Dr. Abudu's brother, Lt. Col. Hamidu, and other opponents of the Rawlings regime. Id. at 6.

On February 1, 1985, Dr. Abudu moved to reopen his deportation proceedings to permit him to apply for asylum and withholding of deportation. Brief for Petitioner at 6. Dr. Abudu feared that were he returned to Ghana, he would be incarcerated and possibly tortured in order to extract from him information about his brother and other opponents of the government. Respondent's Affidavit at 7. (Dr. Abudu feared that he might be

accused of serving as an "advance man" for another attempt at a coup against the regime. Respondent's Affidavit at 7.)

The BIA, without any hearing, denied Dr. Abudu's motion on the grounds that he failed to state a prima facie case for relief and to explain adequately why he did not apply for asylum and withholding of deportation during the deportation proceeding in late 1981 or early 1982. Brief for Petitioner at 8-9. Dr. Abudu appealed the BIA's decision to the United States Court of Appeals for the Ninth Circuit. Id. at 10.

On October 14, 1986, the Court of Appeals held, among other matters, that on a motion to reopen deportation proceedings to apply for political asylum and to seek withholding of deportation, the BIA must draw all reasonable inferences from the facts in favor of the

petitioner. Abudu, 802 F.2d at 1101-1102. The Court of Appeals found that the BIA, having drawn factual inferences against respondent, erroneously concluded that respondent did not establish a prima facie case for relief.[1] Id. at 1101-02. It accordingly reversed the BIA's denial of respondent's motion to reopen and remanded for an evidentiary hearing on the asylum and withholding of deportation claims. Id.

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[1] While the Court did not separately address the issue of whether respondent adequately explained his failure to apply for such relief during his deportation proceedings, see Brief for Petitioner at 10 n.9, 35, it is clear that it thought respondent's post-proceeding evidence was explanation enough. Abudu, 802 F.2d at 1102 ("[respondent] has presented new evidence supporting his motion to reopen proceedings in order to file for asylum and prohibition against deportation").

SUMMARY OF ARGUMENT

Determination by the BIA of motions to reopen deportation proceedings to seek relief under the Refugee Act of 1980 (the "Refugee Act") must, as Petitioner recognizes, be reasonable and not arbitrary.[2] Brief for Petitioner at 21-22. The application of the standard espoused by the government in its brief, see Brief for Petitioner at 33-43, and evidenced in the BIA's decision to deny respondent's motion in this case, see Petition for Certiorari, Appendix C at 13a, is arbitrary and unreasonable. It

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[2] The Court has held that granting a motion to reopen, at least in non-refugee cases, is a discretionary matter with the BIA. INS v. Rios-Pineda, 471 U.S. 444, 85 (1985), citing INS v. Phinpathya, 464 U.S. 183, 188 n.6 (1984). Of course, arbitrary action by the BIA is an abuse of discretion reviewable by the federal courts. See Ananeh-Firempong v. INS, 766 F.2d 621, 625-26 (1st Cir. 1985).

is also inconsistent with United States obligations, as interpreted by state practice and expert opinion, under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (the "Protocol"), and the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, incorporated therein (the "Convention"). It erroneously assumes that applications of aliens seeking relief as refugees are indistinguishable from those of other aliens. The BIA's approach thus fails to allow for the inherent difficulties asylum seekers face in collecting evidence to substantiate their fear of persecution and in deciding whether and when to seek relief under the Refugee Act.

If the BIA is to decide motions to reopen to seek Refugee Act relief reasonably and not arbitrarily, it should extend to any alien the benefit of the doubt on all factual issues personally relating to the alien, particularly where expert opinion on human rights practices confirms that the state from which the alien seeks protection as a refugee is engaged in persecution and the evidence offered by the alien explaining his or her personal fear of persecution is not inherently unbelievable. Haftlang v. INS, 790 F.2d 140, 143 (D.C. Cir. 1986); Maroufi v. INS, 772 F.2d 597, 600 (9th Cir. 1985).

ARGUMENT

I

Motions to Reopen Deportation Proceedings to Seek Relief Under the Refugee Act Are Essentially Different from Motions to Reopen Deportation Proceedings for Relief Under Other Sections of the Immigration and Nationality Act

Aliens who seek asylum or withholding of deportation under the Refugee Act stand in a fundamentally different posture from aliens seeking relief under other sections of the Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 (1982 and Supp. 1985)) (the "INA"). Congress has implicitly recognized this difference by creating a special set of remedies and related procedures for aliens in the United States who qualify as refugees under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat.

102 (codified as amended in scattered sections of 8 U.S.C.).

The primary objective of an alien seeking to reopen deportation proceedings to claim relief under the non-refugee sections of the INA, such as adjustment of status, see Achacoso-Sanchez v. INS, 779 F.2d 1260 (7th Cir. 1985), is permission to continue to enjoy the benefits of residence in the United States. In contrast, the benefits of residence in the United States, while important, are secondary objectives of an alien seeking asylum, § 208(a), 8 U.S.C. § 1158(a) (1982), or withholding of deportation, § 243(h), 8 U.S.C. § 1253(h) (1982), under the Refugee Act. The primary objective of an alien seeking relief from deportation under the refugee sections of the INA is the avoidance of return to a foreign country where the

refugee would face the risk of persecution. Indeed in many cases, if conditions change in the refugee's home country so as to make existence there less hazardous, the refugee can lose the right to reside in the United States. See Refugee Act, § 208(b), 8 U.S.C. 1158(b) (1982).

The focus of the adjudicator's inquiry on a motion to reopen deportation proceedings under the non-refugee portions of the INA is the alien's situation in the United States. Such a motion may raise questions, for example, as to whether the alien has been continuously present in the United States for a given period of time, Phinpathya, 464 U.S. at 188 n.6, or whether other persons in the United States such as family members or relatives would be unduly burdened by the alien's departure, INS v. Wang, 450 U.S.

139 (1981), reh'g denied, 451 U.S. 964 (1981). The circumstances in the alien's home country are largely irrelevant to the inquiry.

By contrast, the inquiry on a motion to reopen to seek relief under the Refugee Act includes the social and political situation in the country from which the alien seeks protection. Factual issues may include, for example, whether the government of that country has engaged, or may possibly engage, in persecution from which the Refugee Act grants protection, see Ananeh-Firempong, 766 F.2d at 627-28, or whether the alien has a plausible connection with the objects of that persecution such that the alien's fear of persecution is reasonable or credible. See Maroufi, 772 F.2d at 599. In cases involving refugees, circumstances in the United States are

largely irrelevant to the initial determination of the alien's eligibility for relief.

The government suggests, see Brief for Petitioner at 14, that there are no important differences between motions to reopen under the Refugee Act and motions to reopen under other sections of the INA. But the INS as much as conceded these differences when it promulgated regulations implementing the Refugee Act's provisions regarding asylum. The INS, recognizing the limitations of its expertise with regard to conditions in foreign lands, looks under these regulations to the United States State Department's Bureau of Human Rights and Humanitarian Affairs for advisory opinions about the alien's allegations of the threat of persecution in his or her home country. INS Asylum Procedures,

8 C.F.R. §§ 208.7 (1987), 45 Fed. Reg. 37394 (1980); 208.8, 208.10 (1987), 45 Fed. Reg. 37394 (1980) as amended at 48 Fed. Reg. 20684 (1983). The INS customarily extends great weight to these opinions. Helton, Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise, 17 U. Mich. J. L. Ref. 243, 262 (1984).

Decisions whether to grant motions to reopen to seek relief under the Refugee Act by the BIA, then, if they are to be rational and not arbitrary, must take into account the special nature and focus of that relief. They must make allowance both for the limited access of the INS and the BIA to information about conditions abroad, and for the difficulties inherent in making judgments about foreign states often geographically dis-

tant from the United States and culturally even more remote.

II

Aliens Moving to Reopen Deportation Proceedings in Order to Seek Relief Under the Refugee Act Face Special Circumstances Which Require that the BIA Adopt a More Generous Approach to Assessing Evidence on Such Motions

A. The BIA Must Take Into Account the Special Difficulties Faced by a Refugee in Preparing His or Her Case

On a motion to reopen for relief under the Refugee Act, an alien must establish a prima facie case for the relief sought. Wang, 450 U.S. at 141; Haftlang, 790 F.2d at 143. To establish a prima facie case, an alien must present affidavits or other evidentiary material which, if true, would satisfy the requirements for substantive relief, Reyes v. INS, 673 F.2d 1087, 1089-90 (9th Cir.

1982), see also Ananeh-Firempong, 766 F.2d at 626 (petitioner's affidavit alleged specific facts which, if true, would establish eligibility for relief, and therefore made out a prima facie case). The alien must show subjective fear of persecution and some objective basis for that fear. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452-53 (9th Cir. 1985), aff'd, ____ U.S. ____, 107 S. Ct. 1207 (1987). Normally, the alien must allege facts or offer proof tending to show why the alien has reason personally to fear persecution. Ganjour v. INS, 796 F.2d 832, 837 (5th Cir. 1986); Maroufi, 772 F.2d at 599.

In addition to establishing a prima facie case, an alien moving to reopen deportation proceedings to seek a non-discretionary form of relief, such as withholding of deportation, must produce

new material evidence not previously available. See 8 C.F.R. § 3.2 (1987), 27 Fed. Reg. 96 (1962). An alien seeking to reopen to seek asylum must reasonably explain his or her failure to apply earlier. See INS Asylum Procedures 8 C.F.R. § 208.11 (1987), 45 Fed. Reg. 37394 (1980).

Courts have recognized that aliens fleeing persecution are often unable to gather documentary evidence to prove either past persecution or the threat of future persecution.[3] See Cardoza-Fonseca, 767 F.2d at 1453; see also Ananeh-Firempong, 766 F.2d at 628 (unless petitioner were allowed to rely on journalistic account, expert opinions,

[3] This has also been recognized by the United Nations High Commissioner on Refugees and the international community, see infra at 35-36.

and third-party reports, it was difficult to see how he could make out a case of political or social repression in a distant land); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984) ("[a]uthentic refugees rarely are able to offer direct corroboration of specific threats"); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) (sometimes applicant's own testimony is all that is available to show persecution). It is unreasonable to require of asylum applicants the foresight to gather evidence before they leave their home countries; many escape, physically and emotionally exhausted, with only the clothing on their backs. In respondent's case, indeed, there never was a time when he could reasonably have gathered such direct evidence of persecution: the circumstances impelling him to seek relief

did not arise until he had already left his native country, Respondent's Affidavit at 1-5.[4]

If aliens seeking relief under the Refugee Act usually cannot obtain direct proof of the threat of persecution against them before leaving their home countries, they generally cannot do better after having fled. At that point, refugees can provide only their own sworn testimony of the conditions or factors that led them to fear persecution. As the Ninth Circuit has recognized,

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[4] Of course, the fact that the circumstances giving rise to respondent's fear of persecution occurred after he left the country does not make him any less a refugee. "A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee 'sur place'." United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979) ¶ 94.

"[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." Bolanos-Hernandez, 767 F.2d at 1285.

In addition, as respondent's case illustrates, governments that condone persecution often make it very costly for those who have information to testify against them. The government of Ghana considers respondent's brother, whose kinship with respondent is a key reason for respondent's own fear of persecution, an enemy. Respondent's brother has fled the country and hid his whereabouts, presumably for fear of reprisal by government operatives overseas. See Kante Affidavit at 4-5. That the BIA nonetheless faults respondent for failing to provide an affidavit from his brother is plainly unreasonable, see Petition for Writ of Certiorari at 19a. The Board

would not have so erred if it had assessed the evidence provided by respondent in the context of the special problems refugees face when seeking relief under the Refugee Act.

Aliens seeking relief under the Refugee Act, such as respondent, frequently rely on reports by refugee groups in the United States and abroad: Amnesty International, the United Nations High Commissioner for Refugees, Helsinki Watch Committee and others. Courts have recognized the probative value of this evidence, Ananeh-Firempong, 766 F.2d at 628, and the BIA itself has held that the exclusion of such evidence is improper. In re Exame, 18 I. & N. Dec. 303, 304-05 (BIA 1982). Yet one searches in vain the BIA's opinion in this case for any evidence that it examined such reports submitted by respondent with his petition.

The reports submitted by Dr. Abudu included those of the United States State Department Bureau of Human Rights and Humanitarian Affairs, and the BIA's apparent omission to consider these reports is all the more glaring in light of the special role given the State Department in deciding applications for asylum on the merits. 8 C.F.R. §§ 208.7 (1987), 208.8, 208.10 (1987).

The difficulties faced by refugees in establishing cases for relief are particularly acute on motions to reopen which, as respondent's case demonstrates, the BIA decides by making factual inferences without the benefit of a hearing and without affording the applicant an opportunity to submit additional evi-

dence.[5] The BIA is of course not required to reopen deportation proceedings on the basis of allegations that are beyond belief. Haftlang, 790 F.2d at 143. But the difficulties refugees experience in amassing evidence, including the typical delay involved in obtaining available evidence from abroad, require that the BIA, for purposes of a motion to reopen, "accept as true reasonably specific facts professed by an alien in

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[5] Indeed, courts have recognized that in such a procedural setting it is inappropriate for the BIA to assess the credibility of an alien's factual allegations. Haftlang, 790 F.2d at 143; see Luna v. INS, 709 F.2d 126, 128 (1st Cir. 1983) (factual disputes should not be resolved against an alien on motion to reopen unless he has had a fair opportunity to develop his side of the story). As the Ninth Circuit has explained, a "premature assessment and rejection of the truth of the facts" stated in an alien's affadavit on a motion to reopen is "manifestly unfair." Reyes, 673 F.2d at 1089.

support of a motion to reopen." Haftlang, 790 F.2d at 143. See also Sakhavat v. INS, 796 F.2d 1201, 1203 (9th Cir. 1986); Maroufi, 772 F.2d at 600. In respondent's case, the BIA did not find that respondent's allegations were "inherently unbelievable," see Haftlang, 790 F.2d at 144, but principally complained that respondent did not provide enough details about his fear of persecution. The appropriate response to an application for relief under the Refugee Act under these circumstances would be to give the applicant the opportunity to supply the additional details at a hearing. In prematurely assessing and rejecting respondent's factual allegations, the BIA behaved in an unreasonable and arbitrary fashion.

B. The BIA Must Take Into Account the Fears and Concerns That May Lead a Refugee to Delay Making His or Her Application

Applying for relief under the Refugee Act is frequently a major step for a refugee, one fraught with significant emotional and psychological consequences. Aliens usually apply for such relief only after it becomes clear that they have little hope of being allowed to lead their lives in their homelands undisturbed by government harassment and persecution. Some aliens may be especially reluctant to apply for relief under the Refugee Act because of fear of reprisals against family and loved ones in their home countries. Frequently, because of their reluctance to break ties with the homeland, aliens apply for asylum only when all other bases of legal

presence in the country of refuge have been exhausted.

The judgment whether and when it is safe to return home is itself often very difficult. Petitioner makes much of the fact that respondent indicated at the beginning of his deportation proceeding, while the previous government in his home country was in power, that he would seek political asylum, and that he failed to do so shortly after the present government came to power. See Brief for Petitioner at 6 n.3, 8 n.5. That assertion neatly ignores the sequence of governments in respondent's home country, the fact that the previous regime was itself not innocent of significant human rights abuses, Amnesty International Report 1982, 40-41, Record at 45-46, and the possibility that respondent may have hoped for an improvement in the human

rights situation when the new regime initially took over. It is unreasonable and overly restrictive for the BIA to second-guess such prudential judgments with the benefit of hindsight and to penalize aliens who seek the protections of the Refugee Act because some of them, often made with great difficulty and even agony, turn out to be in error.

III

The BIA's Refusal to Consider More Generously Motions to Reopen for Relief Under the Refugee Act Is Inconsistent with United States Obligations Under the United Nations Protocol Relating to the Status of Refugees

The failure of the BIA to consider, while addressing motions to reopen, the special difficulties faced by refugees is inconsistent with United States obligations under international instruments for the protection of refugees to which it is a state party. Under

the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (the "Protocol"), as interpreted by state practice and by the opinion of distinguished experts, the BIA is required to adopt a generous position towards aliens applying for remedies such as asylum, and to give such aliens, in light of their difficulties, the "benefit of the doubt" with regard to their evidentiary burdens.

A. The BIA's Behavior Is Inconsistent with United States Obligations Under the United Nations Protocol Relating to the Status of Refugees, as Indicated by the Handbook on Procedures and Criteria for Determining Refugee Status of the United Nations High Commissioner for Refugees

The Refugee Act codifies United States obligations as a state party to the Protocol. See INS v. Cardoza-

Fonseca, ____U.S. ____, ____, 107 S. Ct. 1207, 1216 (1987). The Protocol, together with the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, incorporated therein (the "Convention"), is "the supreme Law of the Land."[6] U.S. Const. art. VI. BIA decisions on aliens' motions to reopen to seek relief under the Refugee Act, therefore, must be consistent not only with the Act but also with the Protocol and the Convention, as long as there is no irreconcilable conflict

[6] Article 33 of the Convention provides that no contracting state shall "expel or return a refugee in any manner whatsoever" to territories where the refugee's life or freedom would be threatened because of race, religion, nationality, membership of a particular social group, or political opinion [emphasis added]. Article 34 requires that each contracting state "as far as possible facilitate the assimilation and naturalization of refugees" [emphasis added].

between them. See Restatement of Foreign Relations Law of the United States § 134 (Tent. Draft No. 6, Vol. 1, 1985).

Significant guidance on United States obligations under the Protocol and the Convention appears in the Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979) (the "Handbook"), issued by the United Nations High Commissioner for Refugees in conformity with Article II(1) of the Protocol.[7] Cardoza-Fonseca, ____ U.S. at ____, 107 S. Ct. at 1217 n.22. The Handbook incor-

[7] While the Handbook has been recognized by this Court as providing significant guidance in construing the Protocol, it is not legally binding on states parties. See Cardoza-Fonseca, ____ U.S. at ____, 107 S. Ct. at 1217 n.22. The United Nations High Commissioner for Refugees is a specialized office charged with providing international protection to refugees, including those governed by the terms and conditions of the Protocol. See Handbook, ¶¶ 14-17.

porates the practice of states parties; such practice is an important source for the determining and implementing of U.S. treaty obligations.[8] Vienna Convention of the Law of Treaties, May 22, 1969, art. 31(3)(b), U.N. Doc. A/CONF 39/27, reprinted in 8 I.L.M. 679 (1969); Restatement of Foreign Relations Law of the United States § 325(2) (Tent. Draft No. 6, Vol. 2, 1985). The principles enunciated in the Handbook are hence persuasive authority indicating the degree to which the BIA's treatment of motions to reopen to apply for relief under the Refugee Act conforms to United States obligations under international law.

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[8] For a discussion of the practice of one particular state party, Canada, see infra at 43-44.

While insisting that statements by refugees who seek relief must be both "coherent and plausible" and consistent with "generally-known facts," the Handbook declares that authorities must frequently give to the applicant "the benefit of the doubt."[9] ¶¶ 203-204. The Handbook notes, as United States courts have already acknowledged, that "[i]n most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." ¶ 196. Consequently, it indicates that such persons

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[9] While the principles of the Handbook concern primarily the conduct of government examiners at hearings, they should also be relevant to a pre-hearing proceeding, such as a motion to reopen. This is true especially when the prior proceeding deals with a question that is essentially one of fact, such as whether an alien has established a prima facie case for relief.

should not be required to provide independent corroboration for their allegations of persecution. United States courts have been in agreement. See Ananeh-Firempong, 766 F.2d at 628; Bolanos-Hernandez, 767 F.2d at 1285; McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981). Moreover, it recognizes that such persons, having experienced fear of authorities in their own country, may be afraid "to speak freely and give a full and accurate account of [their] case[s]" because of their feelings of apprehension of any governmental authority. ¶ 198.

Under the Protocol and the Convention, the BIA should decide factual issues raised by refugees on motions to reopen with sensitivity to the special difficulties those refugees face in producing evidence, and should not be unreasonable in its expectations of the evi-

dence they can present. See supra at 20-27. It may not, as it did here, simply neglect to consider the bearing of important evidence about conditions in respondent's home country to the facts of the case. See supra at 24-25. Nor may it ignore the political and social context when examining other critical evidence, such as the visit to respondent by a minister in the current government of Ghana. It may not categorically require affidavits from individuals of whose whereabouts the refugee may be unaware and whose disclosure, were it possible, would likely endanger those individuals' lives.

Under the Protocol and the Convention, the BIA also errs in minimizing the importance of events occurring after initial deportation proceedings which the refugee puts forth as new evi-

dence justifying reopening. The Handbook insists that "[t]he cumulative effect of the applicant's experience must be taken into account," ¶ 201, and astutely observes that "a small incident may be 'the last straw,'" which, taken together with the alien's previous experience, makes his fear of persecution "well-founded." Id. This observation is borne out in the instant case. Even if the visit by Alhassan were as ambiguous as the government suggests, see Brief for Petitioner at 37-40, it could well have been the "last straw" which overcame any misgivings respondent might earlier have had about applying for relief under the Refugee Act, and which made him sufficiently apprehensive to seek asylum.

B. The BIA's Behavior Is Inconsistent with United States Obligations Under the Protocol, as Indicated by the Practice of Another State Party, Canada

Canadian practice, which adheres to the benefit of the doubt principle, provides useful guidance for the interpretation of the Refugee Act. As discussed above, the Refugee Act codifies United States obligations under the Protocol. See supra at 31-33. The practice of states parties to the Protocol is, under an established canon of treaty interpretation, a useful guide to United States obligations under that instrument. Vienna Convention of the Law of Treaties, May 22, 1969, art. 31(3)(6) U.N. Doc A/CONF 39/27, reprinted in 8 I.L.M. 679 (1969); Restatement of Foreign Relations Law of the United States § 325(2) (tent.

Draft No. 6., Vol. 2, 1985).[10] Subsequent practice constitutes strong evidence of what the goals and intentions of the parties were. Thus, in deciding how to interpret United States obligations under the Protocol and Convention, this Court should be guided by the interpretation given these agreements by other parties.[11]

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[10] United States courts have recognized this principle of interpretation. See Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); Day v. Trans World Airlines, 528 F.2d 31, 35-37 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976), reh'g denied 429 U.S. 1124 (1977); Husserl v. Swiss Air Transport Co., 351 F. Supp. 702, n.6 (S.D.N.Y. 1972), aff'd, 485 F.2d 1240 (2d Cir. 1973).

[11] Even absent a specific treaty provision, the practice of other states is a useful guide in interpreting United States domestic laws. On several occassions, this Court has looked to the practice of other states for assistance in the interpretation of our own law. This approach has been prevelant in the context of human rights. See e.g., Enmund v. Florida, (Footnote continued)

Canadian practice is especially relevant to a determination of United States obligations under the Protocol because Canada's legal system embodies the principles of Anglo-American law. The INS itself has recognized the relevance of Canadian practice to the implementation of the Refugee Act and thereby of United States obligations under the Protocol and the Convention. Included in the materials of instructions at a recent training conference for asylum officers held by the Office of Refugee, Asylum and

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(Footnote 11 continued from previous page) 458 U.S. 782, 796 n.22 (1982) (examining practice of European and British Commonwealth states in determining whether constitution prohibited death penalty for accomplice liability in felony murders); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (noting that practice of other states was "not irrelevant" in determining whether death penalty was unconstitutional punishment for rape, citing Trop v. Dulles, 356 U.S. 86, 102 (1958)).

Parole were the Guidelines on Refugee Definition and Assessment of Credibility adopted by the Canadian Refugee Status Advisory Committee (the "Guidelines").[12] See Office of Refugee, Asylum and Parole, Asylum Officers Training Conference, June 15-19, 1987, unpublished pamphlet, attached hereto as Addendum A.

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[12] The Refugee Status Advisory Committee (the "RSAC" or "Committee") was established to advise the Minister of Employment and Immigration on whether an alien claiming refugee status is a refugee under the terms of the Convention. Dep't of Employment and Immigration, Canada, Immigration Manual, C.8.01(2) (1986). RSAC members are appointed to provide recommendations to the Minister and do not, in law, perform a decision-making function. Guidelines, ¶ 1. In 1982, the Committee adopted the RSAC Guidelines on Refugee Definition and Assessment of Credibility (1982) to assist RSAC members in making recommendations to the Minister consistent with the requirements of Canada's "international commitment to refugees." Guidelines, § 2.

The Guidelines recognize that a refugee's credibility must be assessed in the "context of the special pressures which refugees frequently face," ¶ 18, and expressly provide that an applicant for refugee status will be given "the benefit of the doubt" with respect to evidentiary matters. ¶ 15. The Guidelines explicity take note of the difficulties faced by refugees in presenting their cases, and of the myriad factors that may cause them to delay in making their applications. Thus, according to the Guidelines, "[a] claim may be credible even though the claim was not made at the earliest possible opportunity." ¶18(a). ¶ 18(a)-(h). In ¶ 18(e), the Guidelines provide that an alien's claim for refugee status may be credible "even though the claimant submits information during a second examination . . . which

was not submitted during the first examination." As the Guidelines explain,

> [t]he claimant may have been reluctant to speak freely during the first examination but may be prepared to provide a full and accurate account on the second occassion.

Respondent, of course, never had an initial examination of his claim for asylum; moreover, important new evidence developed after he was ordered deported. The BIA should therefore extend the benefit of the doubt to aliens like respondent who seek relief under the Refugee Act by way of motions to reopen.[13]

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[13] Again, it should be stressed that the INS has included the Guidelines in its training materials for American asylum officers. See supra at 41-42.

IV

The BIA's Method of Deciding Motions to Reopen Must Respect the Special Circumstances of Refugees

The BIA may properly be concerned with preventing the misuse of the administrative processes of the INS by aliens who bring frivolous claims to relief as a method of delay.[14] See Rios-Pineda, 471 U.S. 444 (Attorney General can exercise discretion so as to legitimately avoid creating an incentive for stalling by aliens with frivolous ap-

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[14] Indeed, a policy of over-restrictiveness by the BIA in considering refugees' motions to reopen to seek relief under the Refugee Act may encourage just such misuse. By making the reopening of deportation proceedings next to impossible, the BIA may create an incentive for refugees to protect themselves by seeking relief during the initial proceedings: if an alien knows he or she has little chance to present a claim later, the alien may be encouraged to seek asylum prematurely.

peals). Nothing requires the United States to tolerate "clearly abusive" or "manifestly unfounded" asylum claims. See Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Office of the United Nations High Commissioner for Refugees - UNHCR (1980), No. 30 (d)(1983), attached hereto as Addendum B. But the BIA, in exercising its "restrictive" function, Wang, 450 U.S. at 143-44 n.5, should respect the difference between motions to reopen to seek relief under the Refugee Act and motions to reopen under the non-refugee sections of the INA. Indeed, it must do so if it is to decide these motions with sound discretion and with due regard for the international conventions regarding refugees to which the United States is a state party.

Further, when considering motions to reopen to seek relief under the Refugee Act, the BIA must respect both the special problems refugees face in making their cases, the concerns that may lead them to delay making their applications, see supra at 28-30, and the limitations of the BIA's own ability to resolve factual issues about conditions in foreign countries, see supra at 16-17. Thus, it is reasonable for the BIA to determine whether the pattern or practice of persecution in the alien's homeland is widely acknowledged by expert opinion on international human rights practices.[18] It is also reasonable for the BIA to determine whether the alien has stated

[18] The BIA has itself recognized the evidentiary value of such information provided by international human rights monitoring groups as well as by the United States State Department Bureau of Human Rights and Humanitarian Affairs. See supra at 16-17, 24.

facts which link the alien to the objects of that persecution.[16] However, the basic question is whether the refugee's fear is reasonable; it is unreasonable for the BIA to do more than determine whether the facts alleged about the alien's personal fear of persecution are reasonably specific and not inherently unbelievable, in the light of the more general information about the practice of persecution in the alien's homeland. See Cardoza-Fonseca, ___ U.S. at ___, ___, 107 S. Ct. at 1213, 1216-18.

In respondent's case, there is no indication that the BIA utilized the general information about the situation

[16] It is well accepted that an alien seeking to reopen deportation proceedings to apply for asylum or similar relief must show why he or she personally fears persecution. See supra at 19.

in respondent's homeland in analyzing his case; there is no indication that the BIA analyzed the evidence produced by respondent in the light of the more general conditions in his home country. Instead, the BIA quibbled with the details of the affidavits submitted by respondent, complained of the absence of an affidavit from respondent's brother, whose whereabouts may be unknown, see Kante Affidavit at 4-5, and speculated about other of respondent's factual allegations. Far from extending the benefit of the doubt to respondent, the BIA essentially resolved all debatable issues against him, with no independent basis for so doing and with no special access to information about conditions in respondent's homeland

which might otherwise have justified such a summary approach.[17]

The BIA's mandate to exercise its discretion reasonably and not arbitrarily requires that in such cases it extend the benefit of the doubt to an asylum seeker. The grave consequences of an erroneous determination for a refugee -- the possibility not only of loss of liberty but of life itself -- require no less.

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August 7, 1987

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[17] That the BIA should have considered respondent's claim without even attempting to place it in the context of the conditions in respondent's home country is not completely surprising, of course, since the BIA does not have the ability to assess evidence about conditions in foreign states. The regulations implementing the asylum provisions of the Refugee Act require the assistance of the United States State Department Bureau of Human Rights and Humanitarian Affairs in considering applications on the merits precisely because this is not a special area of INS or BIA competence. See supra at 16-17, 47, INS Asylum Procedures 8 C.F.R. §§ 208.7, 208.8, 208.10 (1987).

[18] Counsel wish to acknowledge the assistance of Mark L. Movsesian, law student, in the preparation of this brief.

ADDENDUM A

Office of Refugee, Asylum and Parole, Asylum Officers Training Conference, June 15-19, 1987, Guidelines on Refugee Definition and Assessment of Credibility (1982) adopted by the Canadian Refugee Status Advisory Committee, unpublished pamphlet

ASYLUM OFFICERS TRAINING CONFERENCE

June 15 through 19, 1987

COMFORT INN HOTEL

Washington, D.C.

OFFICE OF REFUGEE, ASYLUM AND PAROLE

Date February 20, 1982

REFUGEE STATUS ADVISORY COMMITTEE GUIDELINES ON REFUGEE DEFINITION AND ASSESSMENT OF CREDIBILITY[1]

Preamble

1. It is recognized that no two refugee claims are the same. Each Committee member will use his or her best judgement in arriving at a recommendation in an individual case. Nevertheless, the discretion which is exercised by Committee members is circumscribed in two significant respects. The first involves the legal definition of a "Convention Refugee" as found in the Immigration Act, 1976. The second involves the ["]spirit" of interpretation of which the Minister desires in the application of this definition. In this respect, members should bear in mind that they have been appointed to provide recommendations to the Minister and are not, in law, performing a decision-making function. While the Committee is independent of Employment and Immigration Canada, it is subordinate to the Minister.

2. It is hoped that, together with the explanatory material set forth in the UNHCR's Handbook on Procedures and Criteria for Determining Refugee

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[1] Text of footnotes omitted in original.

Status, these guidelines will assist Committee members in meeting both the legal requirement of our legislation and the "spirit" of our international commitment to refugees.

Guidelines: Refugee Definition

3. When the application of the refugee definition to a claimant is in doubt, the claimant will receive the benefit of the doubt.

4. A person is a refugee if he has a well-founded fear of future persecution based on one of the five criteria in the definiton. Past persecution is evidence to substantiate a well-founded fear. However, it is not the only evidence. A person may not have been persecuted in the past, and yet still be a refugee. Looking, as it does, to the future, the refugee definition is concerned with possibilities and probabilities rather than with certainties. A well-founded fear may be based on what has happened to others in similar circumstances. Where a person has not been persecuted simply because he has not yet come to the attention of the authorities, he need not wait until he has been detected and persecuted before he can claim refugee status. Nor need he be under the threat of imminent persecution.

5. Interference with personal freedom is not the only form of persecution within the refugee definition. Arbitrary interference with a person's privacy, family, home or correspondence may constitute persecution. Deprivation of all means of earning a livelihood, denial of work commensurate with training and qualifications or unreasonably low pay may constitute persecution. Relegation to substandard dwellings, exclusion from institutions of higher learning, enforced social and civil inactivity, denationalization, passport denial, constant surveillance and pressure to become an informer may all constitute persecution.

6. Persecution may include behaviour tolerated by government in such a way as to leave the victim virtually unprotected by the agencies of the state. A person is a refugee if he has a well-founded fear of persecution (as a result of one of the five factors in the definition) because he is not adequately protected by his government.

7. Persecution may be periodic. It need not be continuous. A person arrested from time to time, interrogated and then released may be considered to be persecuted. Arrest need not be imminent at the time he leaves his country. He may even return to that country for a short period of time wihout being arrested. As long as the pattern of periodic arrest can be expected to

continue, persecution may be established.

8. Persecution may take the form of indiscriminate terror. Persons may be persecuted for no apparent cause at all, other than for the purpose of instilling fright in a population at large. Persons with a well-founded fear of becoming victims of governmental terrorist tactics may be refugees.

9. A person is a refugee whether he is persecuted alone, or persecuted with others. A person need not be singled out for persecution in order to be a refugee. Each claim must be assessed individually. Once that assessment takes place, a claim cannot be rejected simply because a large number of others could also legitimately fear the same persecution.

10. It is recognized that immigration considerations must not be brought to bear on the application of the refugee definition. The possibility that, if one person is given refugee status, ma[n]y others might also be entitled to claim refugee status, is not relevant to whether the claimant is a refugee.

11. A person is a political refugee if he has a well-founded fear based on political opinion. He need not have a well-founded fear based on political activity. Political opinion means what is political in the opinion of the government from which the

refugee flees, not what is political in the opinion of the refugee, or in the opinion of Canadian officials. A person may have been totally inactive politically and have no political opinions of his own. Yet he may, nonetheless, be a political refugee. The political prominence of the claimant is evidence of the likelihood of persecution but it is not a pre-requisite. A person who is disposed to clash politically with authorities from his country and who will probably or possibly suffer persecution because of that disposition may be a refugee.

12. A well-founded fear of persecution need not arise before the claimant has left his country. It may be based on what has happened in the country since the claimant has been abroad. A person who was not a refugee at the time he left his country but who becomes a refugee after he leaves, is a refugee "sur place".

13. A person may be a refugee even though he was able to leave his country without difficulty. He may have obtained a passport through official channels. He may not have been stopped by officials at the port of exit. As long as he has a well-founded fear of persecution based on the reasons in the definition should he have stayed, or should he return, he is a Convention refugee.

14. In determining whether there is a well-founded fear of persecution, what is relevant, is the practice in the country the refugee flees. The legal structure in the country is not, in itself, conclusive.

Guidelines: Credibility Assessment

15. When the credibilty of the claimant is in doubt, the claimant will receive the benefit of the doubt. An applicant who swears to certain allegations will be presumed to be telling the truth unless there be reason to doubt the truthfulness of those allegations31.

16. Inconsistency, misrepresentation, or concealment in a claim should not lead to a finding of incredibility where the inconsistency, misrepresentation or concealment is not material to the claim. If a statement is not believed but if the claim would be well-founded apart from that statement, then refugee status should be granted.

17. The fact that a claim was made only after the claimant received the advice of a lawyer is not relevant to the credibility of the claim. This is not a factor to be taken into account in determining credibilty.

18. There are a number of factors which may be indicative of a lack of credibilty. However, it is important to bear in mind that they may also be consistent with other rational conclusions. These factors must be assessed in each individual case and in the broader context of the special pressures which refugees frequently face:

(a) A claim may be credible even though the claim was not made at the earliest possible opportunity. A genuine refugee may well wait until he is safely in the country before making a claim. He cannot, in every case, be expected to claim refugee status at the port of entry. A genuine refugee may not be aware, immediately, of his entitlement to refugee status. He may be in the country for some time before he becomes aware of our refugee claims procedure.

(b) A claim may be credible even, though, since leaving home, the claimant has been in another country besides Canada and has not claimed refugee status in that other country. The third country may have had a regime similar to the one which the claimant was fleeing. A genuine refugee may have felt it unnecessary to claim refugee status in a third country, because he was able to stay in the third country for the time he wished without claiming refugee status.

(c) A claim may be credible even though the claimant has not approached the Canadian mission in his home country and claimed refugee status. Even for those countries (Chile, Argentina, and Uruguay) where it is possible to claim refugee status at home, a genuine refugee may fear that making such a claim at home would lead to detection and persecution.

(d) Even where a statement is material, and is not believed, a person may, nonetheless, be a refugee. "Lies do not prove the converse."32 Where a claimant is lying, and the lie is material to his case, the Refugee Status Advisory Committee must, nonetheless, look at all of the evidence and arrive at a conclusion on the entire case. Indeed, an earlier lie which is openly admitted may, in some circumstances, be a factor to consider in <u>support</u> of credibility.33

(e) A claim may be credible even though the claimant submits information during a second examination (for example, on an out-of-status claim following an in-status claim) which was not submitted during the first examination. The claimant may have been reluctant to speak freely during the first examination but may be prepared to provide a full and accurate account on the second occasion.

(f) A person may be a credible claimant even though he has never been persecuted. The absence of actual detention or detection by the authorities or of wounds should not lead to the assumption of fabrication.

(g) A claim may be credible even though it is similar to other claims. A claimant should not be suspected of fabricating his claim simply because the pattern of his claim is similar to the pattern of other claims before the Refugee Status Advisory Committee.

(h) A claim may be credible even though it is different from other claims. A claimant should not be be suspected of fabrication because his statements are different from statements made [b]y other refugee claimants originating from the same country.

ADDENDUM B

Office of the United Nations High Commissioner for Refugees, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNCHR Programme (Geneva 1980), No. 30 (1983)

No. 30 (XXXIV) THE PROBLEM OF MANIFESTLY UNFOUNDED OR ABUSIVE APPLICATIONS FOR REFUGEE STATUS OR ASYLUM *

The Executive Committee,

(a) *Recalled* Conclusion No. 8 (XXVIII) adopted at its twenty-eighth session on the Determination of Refugee Status and Conclusion No. 15 (XXX) adopted at its thirtieth session concerning Refugees without an Asylum Country;

(b) *Recalled* Conclusion No. 28 (XXXIII) adopted at its thirty-third session in which the need for measures to meet the problem of manifestly unfounded or abusive applications for refugee status was recognized;

(c) *Noted* that applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria constitute a serious problem in a number of States parties to the 1951 Convention and the 1967 Protocol. Such applications are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees;

(d) *Considered* that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum;

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* CONCLUSION ENDORSED BY THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME UPON THE RECOMMENDATION OF THE SUB-COMMITTEE OF THE WHOLE ON INTERNATIONAL PROTECTION OF REFUGEES.

(e) *Recognized* the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees and therefore recommended that:

(i) as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status;

(ii) the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;

(iii) an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, governments should give favourable consideration to their establishment. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.

(f) *Recognized* that while measures to deal with manifestly unfounded or abusive applications may not resolve the wider problem of large numbers of applications for refugee status, both problems can be mitigated by overall arrangements for speeding up refugee status determination procedures, for example by:

(i) allocating sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously, and

(ii) the introduction of measures that would reduce the time required for the completion of the appeals process.

AMICUS CURIAE

BRIEF

No. 86-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

ASSIBI ABUDU,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF CENTRO PRESENTE, INC., NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, INC. AND ASYLUM APPEALS PROGRAM OF THE SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS

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Centro Presente, Inc., the National Immigration Project of the National Lawyers Guild, Inc. and the Asylum Appeals Program submit this brief as *Amici Curiae* in support of Respondent's claim that the judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 14, 1986, should be affirmed. Pursuant to Rule 36.2, all parties to this action have given their written consent to the filing of this brief. Copies of the letters of consent are being filed concurrently with the Clerk of the Court.

INTEREST OF THE AMICI

Centro Presente, Inc. is a non-profit organization with its principal office in Cambridge, Massachusetts. It provides comprehensive services, including legal, educational and social services to Central American refugees who have fled to the United States. The work of its legal department

includes representation and counseling to assist these refugees in preparing and presenting their requests for political asylum and withholding of deportation before immigration judges in deportation proceedings.

The National Immigration Project of the National Lawyers Guild, Inc., is a national organization, which includes as a project the Central American Refugee Defense Fund, whose purpose is to promote and ensure the fair and humane administration of justice relating to immigration and refugee law. The membership of the National Immigration Project consists of attorneys who practice regularly before the Immigration and Naturalization Service in all of its districts nationwide, including all district levels of the Executive Office for Immigration Review, and the Board of Immigration Appeals. Its member attorneys regularly appear in immigration and refugee matters pending before the federal district courts and federal circuit courts of appeal of the United States, and before the Supreme Court of the United States.

The Asylum Appeals Program is a special project of the San Francisco Lawyers' Committee for Urban Affairs. The Lawyers' Committee is the Northern California affiliate of the national Lawyers' Committee for Civil Rights Under Law. The Asylum Appeals Program is dedicated to ensuring the development of asylum law consistent with its statutory and international law antecedent and its humanitarian purpose. The program seeks to enhance the quality of argument in asylum cases by bringing to bear the *pro bono* resources of the private bar and by assisting and advising these attorneys representing asylum applicants in appellate proceedings.

Amici seek to maintain proper asylum and deportation procedures so that the United States may continue to enjoy its reputation as a safe haven from persecution and so that those seeking refuge in the United States may enjoy clear, uniform and fair asylum and deportation procedures.

SUMMARY OF ARGUMENT

I.

The Board of Immigration Appeals ("Board") does not have unfettered discretion to refuse to reopen deportation proceedings to entertain an application for withholding of deportation. If an alien can present a *prima facie* case that his life or freedom would be threatened upon deportation, the Board must reopen it for an evidentiary hearing. The two statutory provisions at issue here provide for distinct forms of relief and therefore entail different procedural requirements. Under I.N.A. § 208(a), 8 U.S.C. § 1158(a), after an alien establishes eligibility as a refugee, the Board has discretion to grant asylum. If, however, the alien proves his or her refugee status under I.N.A. § 243(h), 8 U.S.C. § 1253(h), the alien is automatically entitled to withholding of deportation. Furthermore, the mandate of 8 U.S.C. § 1253(h) does not admit exceptions to the scope of its relief based on considerations of timing or administrative convenience because the statute was intended to protect a refugee's most fundamental human rights, life and liberty, which would be jeopardized were he or she to be deported.

II.

A reviewing court has the duty to determine whether the Board considered evidence in a proper manner in deciding a motion to reopen the withholding of deportation. The review of whether evidence was decided by the Board in a proper manner includes whether all of the evidence was considered as a whole and whether newly presented evidence was considered not separately, but in the context of the prior known facts. Prior known facts, or newly presented facts, each standing alone, may not separately constitute a *prima facie* case; when viewed together, however, a *prima facie* case may emerge. Whether one's subjective fear rises to the level of a well-founded fear or a clear probability of persecution can rarely be determined from one or two factors viewed in isolation, but must always be evaluated in the context of the situation as a whole. Finally, the reviewing

court also has a duty to ensure that the standards applied to the review of discretionary claims are not confused with the standards for review of mandatory claims. *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207 (1987).

III.

The Attorney General improperly attempts to apply the standard of review for suspension of deportation to asylum and withholding cases. The brief cites decisions which deal only with suspension for the proposition that the Board has unfettered discretion to refuse to reopen asylum and withholding cases. The suspension statute commits to the Attorney General's discretion the power to determine if the applicant meets one of the three elements of eligibility for suspension, extreme hardship. The asylum and withholding statutes grant no such discretion to determine statutory eligibility to the Attorney General. *See INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984). To adopt the position put forth by the Attorney General this Court would have to ignore the differences in statutory language and structure and contravene Congress' intent in formulating separate statutory systems.

ARGUMENT

I. The Board of Immigration Appeals Must Reopen Deportation Proceedings if an Alien has Presented a *Prima Facie* Case That His Life or Freedom Would be Threatened Upon Deportation

The Attorney General claims that the Board of Immigration Appeals has broad and unfettered discretion to refuse to reopen deportation proceedings. Pet. Br. 12-13. That position requires, however, a misreading of the statutes providing for asylum and withholding of deportation and mistakenly applies the same legal standards to motions to reopen both types of proceedings. In reality, no such discretion exists in withholding cases where a *prima facie* showing has been made.

The Board must reopen deportation proceedings whenever an alien presents a *prima facie* case that his life or freedom will be threatened. In its firm command that "[T]he Attorney General *shall not* deport..." an alien who presents a clear probability of persecution, § 243(h) sets no time limits and makes no provision for administrative convenience.[1] (Emphasis added.) Where such a showing has been made, the Board must then either accept it, in which case withholding follows automatically, or grant an evidentiary hearing, where the showing may be developed and contested.

Congress has enacted two statutory provisions under which an alien may obtain refuge from persecution. The first provision allows the Attorney General discretion to a grant asylum to an alien who can establish refugee status. 8 U.S.C. § 1158(a). The second provision provides that the Attorney General *shall not deport* an alien who can establish that his life or freedom would be threatened in the country to which he is to be deported. 8 U.S.C. § 1253(h). The Attorney General has established procedures regulating the

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[1] The Attorney General argues, "Granting such motions too liberally would overload the immigration authorities with evidentiary hearings in cases which have already been fully adjudicated and would provide incentives to aliens to file frivolous motions solely to delay deportation." Pet. for cert. 12-13. Without granting the validity of this premise, the interpretation of the regulation upon which he bases his argument flatly contradicts the mandatory character of § 243(h). As such, the interpretation is entitled to no deference and must be corrected by the reviewing court. *Cardoza-Fonseca*, 107 S. Ct. at 1220-21, 1220-21 n.29. Furthermore, the Attorney General advances no evidence that § 243(h) motions will overwhelm the Board. Nor does he advance any evidence that aliens will file frivolous motions. Finally, to the extent a motion might be both frivolous and present a *prima facie* case, a curious notion, it may be easily disposed of at a hearing. To the extent they are not frivolous they fall squarely within Congress' desire in enacting § 243(h). If such motions in fact overwhelm the Board this Court, other courts, the Board, and others are free to suggest legislative relief. But, the burden of the Board is to implement § 243(h), as delegated, and the burden of the courts properly to review the delegation and implementation.

deportation process, including motions to reopen deportation proceedings.

Under 8 C.F.R. § 208.3(b), a request for asylum is also treated as a request to withhold deportation. This Court has held, however, that regulations applicable to discretionary asylum requests do not directly apply to mandatory withholding motions. *See Stevic*, 467 U.S. at 423 n.18. The standards and procedural duties differ because they spring from statutes providing differing relief. *Id.*

Because the Attorney General "shall not deport" threatened aliens, § 243(h), it follows that the Attorney General may not do procedurally what is forbidden in any capacity by the statute.[2] The Attorney General may not, therefore, use his discretion invested under the asylum statute, § 208(a), to limit motions to request withholding of deportation. If so permitted, the Attorney General would be in direct contravention of the clear intent of Congress by instituting procedural hurdles which embody, *sub silentio*, the very discretion that Congress has determined not to delegate.

The alien must, of course, comply with a significant burden to obtain reopening of his request for withholding of deportation. The alien must set out a *prima facie* case established by "affidavits or other evidentiary material," 8 C.F.R. § 103.5, "which, if true, would satisfy the requirements for substantive relief." Pet. for cert. 7a-8a, (quoting

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[2] The Attorney General's claim of broad discretion for the Board relies entirely on three cases decided in recent years by this Court: *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Phinpathya*, 464 U.S. 183 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981). Pet. Br. 13. But, as the Attorney General concedes, all are cases involving motions to reopen to apply suspension of deportation. Pet. Br. 14. Suspension of deportation is a matter committed to the discretion of the Attorney General; withholding of deportation is not. As this Court recently made clear, the distinction is legally vital. *Cardoza-Fonseca*, 107 S. Ct. at 1211-12 n.6; *see also Ananeh-Firempong* v. *INS*, 766 F.2d 621, 624-25 (1st Cir. 1985) (Breyer, J.) (concluding that, "Congress simply withdrew from the Attorney General the power to withhold § 243(h) relief to those who meet that standard.").

Reyes v. *INS*, 673 F.2d 1087, 1089-90 (9th Cir. 1982)); *see also Ananeh-Firempong* v. *INS*, 766 F.2d 621, 626 (1st Cir. 1985) (Breyer, J.).

The Board has the power to determine whether a *prima facie* case is stated. If an alien sets out a *prima facie* case that his life or freedom would be threatened if he were deported, however, the Board must grant the motion to reopen in order to determine whether, in fact, the alien must not be deported.

II. A Reviewing Court Has the Duty to Determine Whether the Board Considered Evidence in a Proper Manner in Deciding a Motion to Reopen for Withholding of Deportation

The duty of the reviewing court is to ensure that the Board fulfilled its obligation to consider the sufficiency of all the evidence as a whole. Pursuant to that duty, the reviewing court must ensure that the Board consider all of the evidence presented to it and must require the Board to reexamine denials of motions to reopen where the record demonstrates that the Board failed to consider all of the evidence taken as a whole.

To the extent that 8 C.F.R. § 3.2 may apply to motions to reopen for withholding of deportation, motions to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." [3] In the context of § 243(h), where

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[3] *Amici* note that the mandatory language of the Refugee Act of 1980 in § 243(h) refers to circumstances different from those referred to in the second part of the third sentence of 8 C.F.R. § 3.2 (". . .nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.") Since subsequent circumstances can permit the reopening of discretionary relief, then subsequent circumstances require the re-

material evidence, not previously available, is discovered and presented in a motion to reopen, 8 C.F.R. § 3.2 must be read to require that it be considered by the Board in a proper manner.

In fulfilling its proper role of review for abuse of discretion, the responsibility of the lower court is to examine whether the Board reviewed the newly discovered evidence in the context of all the evidence, and not just standing alone. Newly discovered evidence, standing alone, may not constitute a *prima facie* case any more than the prior evidence did, standing alone. But when the evidence is brought together, the complexion of the facts change and the *prima facie* case may emerge.[4]

The proper role of the reviewing court is to require that the newly presented evidence be considered in the context of the evidence as a whole. The court can and should find legal error where the Board fails to consider the newly presented evidence in its proper context.[5] The reviewing function of the court includes its responsibility to ensure

consideration of whether a *prima facie* case is stated under the mandatory language of § 243(h).

[4] *Amici* understand Dr. Abudu to argue that the Board erred in two ways. First, the Board did not consider the significance of the visit by the governmental agent when it concluded that Dr. Abudu had not presented a *prima facie* case. The visit, and its significance, is not mentioned in the Board's discussion of the *prima facie* case which begins, "[W]e further find. . ." and which ends with the Board's evaluation that his claims are speculative. Dr. Abudu has not claimed that the evidence previously available, without consideration of the visit, supports a claim for withholding of deportation. He claims that the consideration of that evidence, together with the visit, constitutes a *prima facie* case. Second, Dr. Abudu argues that the Board evaluated the significance of the visit alone, apart from the prior evidence. Without the previously available evidence being considered with the visit, the visit could lose its significance — that is, focusing Ghana's political violence on Dr Abudu personally, jeopardizing his life or freedom.

[5] *Amici* do not argue or imply that the court should substitute its weighing of the evidence and findings of the significance of newly presented evidence for that of the Board. But the proper reviewing function is for the court to inquire whether the newly-presented

that the Board does not confuse the application of standards for discretionary claims with those of mandatory ones. This Court has recently held that a critical difference exists between discretionary and mandatory considerations. *Cardoza-Fonseca*, 107 S. Ct. 1207 *passim*. As this Court noted, "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Cardoza-Fonseca*, 107 S. Ct. at 1221 (quoting *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984)).

The reviewing court may properly examine whether the Board confused Dr. Abudu's failure to file an asylum application at an earlier date, which might make a difference in an asylum analysis, 8 C.F.R. § 208.11 (duty of reasonable explanation), with whether a *prima facie* case is stated under § 243(h).[6] Nothing in the Refugee Act of 1980, § 243(h), or the regulations concerning motions to reopen, 8 C.F.R. § 3.2, suggests that the Board has the power or authority to discount, ignore, or otherwise improperly consider previously available or newly discovered evidence in the evaluation of a *prima facie* case for the withholding of deportation even if such newly discovered evidence would not have constituted a "reasonable explanation" under 8 C.F.R. § 208.11. To permit a process that forecloses proper consideration of relevant, even crucial, evidence, would

evidence was considered in the context claimed to be legally significant.

[6] Dr. Abudu claims that the Board did not construe the *prima facie* case appropriately. The Board held, "[G]iven that so much of the evidence upon which the respondent now bases his persecution claim was available at the time of the hearing, we are not persuaded that the visit by a member of the present government was by itself so alarming that it explains the respondent's failure to apply for asylum at the hearing." Pet. for cert. 17a. Dr. Abudu argues that this evaluation was made in a discussion of his failure to file his application earlier and that the Board did not apply the analysis to the evidence as presented in his *prima facie* case. Further, as stated earlier, the quality of the *prima facie* case does not depend upon when the evidence being presented became available.

undermine the stated purpose of the Refugee Act of 1980, which is to forbid deportation where a person's life or freedom would be threatened.

In sum, the role and a core function of a reviewing court is to determine whether the Board has considered newly presented evidence in a legally proper manner. The legally proper manner requires consideration of whether the newly presented evidence, taken together with known facts, constitutes a *prima facie* case. Of course, establishing a *prima facie* case does not necessarily end the matter in claimant's favor. The government may elect to challenge or contradict the allegations made out in a *prima facie* case and this is done through a properly constituted evidentiary hearing. The purpose of the procedural process is to ensure that individuals with a "clear probability of persecution" are not forced to face their persecutors due to an erroneous procedural decision. *Stevic*, 467 U.S. at 413.

III. The Scope of the Board's Discretion to Reopen Political Asylum Cases is Distinct From That Which It Has in Suspension of Deportation Cases[7]

The Attorney General claims that the procedural rules and standard of review for requests to withhold deportation and to obtain asylum are the same. The language of the statutes, the quality of relief available under the statutes and this Court's recent decision in *Cardoza-Fonseca*, all decisively rebut the Attorney General's claim. The Attorney General, however, makes a further claim that should not

[7] *Amici* recognize that the comments in this section relate to the underlying claims of asylum and suspension. This discussion is necessary because the Attorney General has conflated the standards for both withholding and asylum motions to reopen with his discretion in suspension of deportation cases. *Amici* recognize that there are no cases from this Court enunciating the scope of the discretion in motions to reopen to request asylum or the withholding of deportation. But, this section argues that since the scope of discretion in the underlying substantive claims under each of these statutes is different, so too should this Court recognize the differing scope of discretion for motions to reopen to request asylum as opposed to suspension.

escape this Court's notice. The Attorney General subtly attempts to import to both withholding and asylum claims the standard of review applicable to suspension of deportation cases, where the Attorney General's discretion is at its height. The Attorney General argues that the standard for all three situations should be whether the refusal to reopen is "plausible." Pet. for cert. "I" ("Questions presented").

In cases of requests for political asylum, a *prima facie* case is established by alleging facts, which, if true, would establish a well-founded or reasonable fear of persecution. *Cardoza-Fonseca*, 107 S. Ct. at 1222. Thereafter the Attorney General still has discretion to decide whether it is appropriate to grant asylum.[8] *Id.* at 1219. In applications for suspension of deportation, statutory eligibility for the underlying relief is dependent, in part, upon a discretionary determination that the element of extreme hardship has been established. 8 U.S.C. § 1254(a). Moreover, under this statute, even after the elements for statutory eligibility are established, the Attorney General has further discretion as to whether the relief will be granted.

Neither § 208(a) (asylum), nor § 243(h) (withholding of deportation), commits any statutory element of eligibility for relief to the discretion of the Attorney General. *See Stevic*, 467 U.S. at 423 n.18. Therefore, reliance on *Rios-Pineda*, *Jong Ha Wang* and *Phinpathya* is misleading because statutory discretion is not given to the Attorney General in asylum and withholding of deportation cases. Furthermore, where discretion is not vested by statute, it cannot be created by judicial fiat. Thus the Board should

[8] The exercise of discretion is not without limits. A ruling that no *prima facie* case exists where the record reflects that the alien has alleged a reasonable fear of persecution as defined by statute, or that it is more likely than not that such persecution will be suffered, constitutes an abuse of discretion. *Ananeh-Firempong*, 766 F.2d at 626 (Breyer, J.) (holding). Similarly, where facts constituting a *prima facie* case have been found to be true at a prior evidentiary hearing, the Board cannot later deny a motion to reopen premised upon the absence of a *prima facie* case. *Luna* v. *INS*, 709 F.2d 126 (1st Cir. 1983) (Breyer, J.).

have more limited discretion to decide motions to reopen in asylum cases than in suspension of deportation cases.

Further, the Board's process of deciding whether to reopen a deportation proceeding to apply for asylum must be guided by Congress' goal of protecting *bona fide* refugees in order to comply with our obligations under international law, especially under the 1967 *United Nations Protocol Relating To The Status of Refugees. Cardoza-Fonseca*, 107 S. Ct. at 1214-15. No comparable legislative intent or international obligations compelled Congress to enact 8 U.S.C. § 1254(a), suspension of deportation; thus, no comparable reasons exists to temper the Board's discretion in deciding motions to reopen suspension cases.

In contrast, this Court has recently recognized the humanitarian intent behind the Refugee Act of 1980 and the need to respond flexibly to situations involving religious or political persecution. *Cardoza-Fonseca*, 107 S. Ct. at 1222. While judicial review of motions to reopen suspension cases is limited, those strict limits must not be applied to motions to reopen to apply for asylum. Otherwise, the protections that Congress intended for refugees would disappear in cases where changed circumstances, ineffective assistance of counsel, lack of counsel, or new evidence have prevented a refugee from presenting an asylum claim at the original deportation hearing.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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